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THE UNITED STATES AND THE PERMANENT COURT OF INTERNATIONAL JUSTICE

By Quincy Wright
Of the Board of Editors

On August 15, 1921, the Secretary of State of the United States acknowledged receipt from the Secretary General of the League of Nations of a certified copy of the protocol of the Permanent Court of International Justice opened for signature on December 16, 1920, by members of the League and states mentioned in the annex to the Covenant.[1] On February 24, 1923, President Harding submitted the protocol and the accompanying statute to the Senate with a request for its consent to American adhesion with four "conditions and understandings" explained in an attached letter from Secretary of State Hughes, dated February 17, 1923.[2] President Harding continued to speak for the court until his death,[3] and on December 6, 1923, President Coolidge commended the proposal to the Senate. Resolutions on the subject were introduced in the Senate by Senators Lenroot of Wisconsin (December 10, 1923), Pepper of Pennsylvania (April 7, 1924), Lodge of Massachusetts (May 5, 1924), Swanson of Virginia (May 5, 1924), King of Utah (May 20, 1924), and on May 26, 1924, Senator Pepper submitted a report from the Committee on Foreign Relations endorsing his proposal for Senate consent with radical amendments to the statute.[4] The minority of the committee submitted a report embodying the Swanson resolution, which followed the Harding-Hughes proposal, with the addition that:

> The signature of the United States to the said protocol shall not be affixed until the Powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adhesion by the United States to the said protocol.

Both party platforms in 1924 endorsed the court, and on December 3, 1924, President Coolidge again commended the Harding-Hughes proposal to the Senate, with the additional condition that "our country shall not be bound by

[1] The United States, Ecuador and the Hedjaz are the only states mentioned in the annex to the Covenant which are not members of the League of Nations. The texts of the protocol and statute are printed in this Journal, Supp., Vol. 17, pp. 55–57.

[2] This Journal, Vol. 17, pp. 331–343.

[3] For an exposition of President Harding's attitude, see remarks of Senator Willis of Ohio, Cong. Rec., Jan. 4, 1926, Vol. 67, p. 1418.

[4] 68th Cong., 1st Sess., Sen. Res. 29, 204, Sen. J. Res. 122 accompanied by Sen. Doc. 107, Sen. Res. 220, 233, 234, also printed in Sen. Doc. 116 and Sen. Report 634. See comments of Senator Borah on the latter, Cong. Rec., Jan. 14, 1926, Vol. 67, p. 2038.

advisory opinions which may be rendered by the court upon questions which we have not voluntarily submitted for its judgment." [5]

Resolutions on the subject introduced in the House of Representatives by Mr. Moore of Virginia (April 17, 1924), and Mr. Fish of New York (January 28, 1925), were combined in a resolution reported favorably by Mr. Burton of Ohio from the Committee on Foreign Affairs on February 24, 1925.[6] This resolution, which expressed the "earnest desire" of the House that the "United States give early adherence to the protocol . . . with the reservations recommended by President Harding and President Coolidge" and its "readiness to participate" in the enactment of necessary legislation, was approved (303 to 28) on March 3, 1925.[7]

In his inaugural address on March 4, 1925, President Coolidge advocated adherence to the court with the remark that "we ought not to withhold our own sanction because of any small and inessential difference," and on the next day Senator Swanson reintroduced his resolution in the special session of the Senate, with an addition incorporating President Coolidge's suggestion in the following terms:

> 5. That the United States shall be in no manner bound by any advisory opinion of the Permanent Court of International Justice not rendered pursuant to a request in which it, the United States, shall expressly join in accordance with the statute for the said court adjoined to the protocol of signature of the same to which the United States shall become signatory.

At the same time Senator Willis of Ohio introduced an almost identical resolution.[8] On March 13, 1925, the Senate voted (77 to 2) to consider the Swanson resolution in open executive session on December 17, 1925.[9]

On December 8, President Coolidge again endorsed the court in his annual message, and on December 17 Senator Swanson opened the debate, which continued through over 300 pages of the Congressional Record, until January 25, 1926, when a filibuster having appeared, the cloture rule was put in effect by a two-thirds vote, and on January 27, 1926, the Senate accepted the resolution (76 to 17) with certain modifications incorporated by Senator Swanson himself.[10]

[5] See remarks by Senators Lenroot and Willis, Cong. Rec., Dec. 18, 1925, Jan. 4, 1926, and Jan. 14, 1926, Vol. 67, pp. 1071, 1417, 2043.

[6] 68th Cong., 1st Sess., House Res. 258; 68th Cong., 2nd Sess., House Con. Res. 38, House Res. 426; hearings on latter before Committee on Foreign Affairs, Jan. 21, 27, 31, 1925, and House Report 1569.

[7] Cong. Rec., Vol. 66, p. 5413; also this JOURNAL, Vol. 20, p. 151.

[8] 69th Cong., 1st Sess., Sen. Res. 5, 6. See World Peace Foundation, Pamphlet Series, 1925, Vol. 8, pp. 207–216.

[9] Cong. Rec., Vol. 67, p. 207.

[10] *Ibid.*, Vol. 67, p. 2825. Senators Walsh (Mont.), Lenroot (Wis.), and Swanson (Va.), lead the debate in behalf of the resolution, and Senators Borah (Idaho), Williams (Mo.), and Moses (N. H.), against it. Senator Pepper (Pa.) contributed most to the compromise

These modifications disavowed the assumption of any obligations under the Treaty of Versailles instead of merely under the League Covenant, gave the United States the right to withdraw, and rewrote the fifth reservation relating to advisory opinions. Two additional provisions of a type becoming habitual in recent American practice were added but not included in the requirement of express assent by the present signatories.[11] One insisted on Senate consent to agreements submitting cases to the court and the other reserved the policies of Washington's Farewell Address and the Monroe Doctrine in the same terms used in reservations to the I Hague Convention. The fifth reservation, which constitutes the most serious departure from the Hughes-Harding-Coolidge plan, appeared in the following form:

> 5. That the court shall not render any advisory opinion except publicly after due notice to all States adhering to the court and to all interested States and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

The steps leading up to the formulation of this reservation may be briefly considered. On December 18, 1925, Senator Borah, leader of the opposition to American adherence, proposed a reservation: "that no jurisdiction shall be exercised by or conferred upon and no duties or service shall be performed by or imposed upon or required or requested of the court other than such as now provided for in the statute of the court unless the statute is amended in due form and such amendment ratified by every nation signatory to the protocol of adherence to the statute of the court." [12] He apparently intended thus to bar advisory opinions altogether on the assumption that the court's authority in this respect came, not from the statute but from the Covenant, though in view of Article 36 of the statute, which expressly extends the court's jurisdiction to "all matters specially provided for in treaties and conventions in force," it is doubtful whether the reservation would have had that effect. This was followed by a suggestion by Senator Pepper two days later which seems to have lead more directly to the revision of the fifth reservation. The latter assured the supporters of the court that it could get the necessary two-thirds vote if additional "safeguarding measures" were introduced in regard to advisory opinions. "Through the right to call for

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finally adopted on the fifth reservation. Senators Blease (S. Car.) and Reed (Mo.), the only Democrats opposed to the resolution, were the main contributors to the filibuster. The full text of the resolution is printed at the end of this article, p. 24.

[11] The modifications of the original Swanson resolution are explained by Senator Walsh, Cong. Rec., Jan. 25, 1926, Vol. 67, p. 2679. The two understandings are copied from I Hague Convention, 1907, Malloy, Treaties, Conventions, etc., Vol. 2, p. 2247. The first was appended to I Hague Convention, 1899, and in substance to the Algeciras Convention, 1906, *ibid.*, pp. 2032, 2183.

[12] Cong. Rec., Vol. 67, p. 1075.

these," he conceived, "the Council of the League may exercise a potent and effective influence upon the court," and "instead of, on the one hand, affirming broadly that all advisory opinions are desirable and, on the other, denying that any of them are," he proposed "to analyze the jurisdiction and select the specific points which are really of importance to the United States." These he found to be three:[13]

> In the first place, it is now the rule and the practice of the Permanent Court of International Justice to give no confidential or secret advice. I believe that the United States will do well, in adhering to the court, to declare its understanding that this is a permanent and not a transient policy. The court interprets itself as a court and not as a conclave; and I think we ought to state in no uncertain terms our understanding that it is to a court that we are adhering.
>
> In the second place, I think that there should be an equally explicit declaration that the decision of the court in the Eastern Carelia case is likewise the expression of an acceptable and permanent policy; acceptable, I mean, to the other signatory Powers; for I suggest that it would be most unfortunate if we were to leave to the chance of majority opinion within the court itself the decision at a future date of a question which seems to me to be vital to the usefulness and independence of the court.
>
> In the third place, it is well to do as the fifth paragraph of the resolution does, namely, announce that the United States will not be bound by any advisory opinion rendered on any question which we have not joined in submitting. I suggest, however, that we should go further, and request the assent of the signatories to the proposition that there shall be no advisory opinion on any matter directly affecting the United States unless the United States shall have consented that the court may take jurisdiction of that question and give an advisory opinion thereon.
>
> There is nothing drastic or unreasonable in any one of the three suggestions that I have made. The first two might properly be made the subject of reservation. They are declarations of the understanding of an existing status upon the basis of which we are moved to adhere. The third might properly be a condition or amendment to be assented to by an exchange of notes or other appropriate method in accordance with good diplomatic usage.

In the ensuing debate there seemed to be an increasing desire to safeguard the principle of the Eastern Carelia case by reservation, and on January 14, 1926, Senator Lenroot, one of the leading sponsors of the resolution, though insisting that "the court has so construed its own jurisdiction that unless there should be a change in the court the United States is fully protected with regard to advisory opinions affecting its own interests," expressed willingness to consider whether the fifth reservation might not be strengthened to prevent a change in the court's attitude.[14] Senator Swanson expressed a similar opinion on January 18.[15]

Senators Borah, Moses and others continued to oppose all advisory opinions,[16] while there was some discussion of assuring the United States a position of equality in controlling the submission of advisory opinions.[17] It was

[13] Cong. Rec., Vol. 67, pp. 1245–1246.
[14] *Ibid.*, p. 2046.
[15] *Ibid.*, p. 2291.
[16] *Ibid.*, pp. 2038, 2194, 2292, 2295.
[17] See Senator Pepper's interesting remarks, Jan. 18, 1926, *ibid.*, p. 2296.

pointed out that this would involve a modification of the League Covenant, but the explanation given by Senator Pepper in the following colloquy seems to have been accepted:[18]

MR. WALSH. You can do whatever you please with the court by reservation; but when you undertake to state what the Council can do and what the Council can not do, then you are reforming the Covenant of the League of Nations.

MR. BORAH. Exactly; but where is the provision in the statute which provides for advisory opinions?

MR. WALSH. The Senator from Wisconsin (Mr. Lenroot) and the Senator from Maryland (Mr. Bruce) and myself have expressed our views about that matter.[19]

MR. LENROOT. Article 36.

MR. BORAH. The members of the court contend that there is no authority at all in the statute for advisory opinions.

MR. WALSH. To what does the Senator refer?

MR. BORAH. I refer to Judge de Bustamente's book, and I refer also to the views of Judge Moore.

MR. WALSH. No; the Senator can not refer to the views of Judge Moore, because I have Judge Moore's views on my desk here, and he says that the provisions are incorporated in the statute by reference.[20]

MR. BORAH. I know that lecture; yet, nevertheless—

MR. WALSH. Judge Moore, then, does not state that the jurisdiction does not depend upon the statute.

MR. BORAH. I assert that Judge Moore is now of the opinion that the sole authority for advisory opinions is in the Covenant, and I know whereof I speak.

MR. WALSH. I suppose there is some significance to be attached to the adverb in that statement, that he *now* does. I can speak only from the public declaration of Judge Moore. I have it in my hand here. So far as Judge de Bustamante is concerned, I can not speak so positively about that, because I have to speak from recollection; but I do not remember that Judge de Bustamente discusses that subject.

MR. BORAH. Yes; I read it here this afternoon.[21]

MR. WALSH. However, if he does, I should differ with him; that is all.

MR. PEPPER. Mr. President, it seems to me that the colloquy which has just taken place gives rise to distinctions that are rather verbal than substantial. We are all agreed

[18] Cong. Rec., Vol. 67, p. 2297.

[19] Lenroot, *ibid.*, Dec. 18, 1925, p. 1068; Walsh, Dec. 21, 1925, p. 1242; Bruce (Md.), Jan. 5, 1926, p. 1482.

[20] Senator Walsh later read the following from Moore, International Law and Some Current Illusions, p. 114: "The Statute as adopted by the Assembly of the League, does not directly mention advisory opinions; but the Court, after careful consideration, reached the conclusion that there were certain clauses of the Statute which by implication incorporated the provision in Art. 14 of the Covenant on that subject." *Ibid.*, p. 2298. See also Moore, in Publications of the Court, Series D, No. 2, pp. 385, 512; Fachiri, Permanent Court of International Justice, p. 67; Wright, this JOURNAL, Vol. 20, p. 459.

[21] Senator Borah seems to have referred to De Bustamente, The World Court, p. 254, which he had read as follows: "The Treaty of Versailles simply placed the court, for the creation of which Article 14 provides, at the disposition of the League as a consulting body. It is useless to argue whether the task is or is not compatible with the judicial function or to assert that it compromises the court's prestige and future. It is not a question of arguing about Article 14 but of applying it and these reasons are not strong enough to modify it." Cong. Rec., p. 2287. This, however, does not say whether the authority of Art. 14 of the Covenant is direct or derivative for the court.

on certain fundamentals. One is that when an advisory opinion is asked by the Council of the League embarrassment may result from the fact that it is asked, quite apart from the question of the action the court takes upon receipt of the request. In the Eastern Carelia case, for instance, there was a grave menace to the peace of Europe in the mere submission of the request for the advisory opinion; and I apprehend that if an advisory opinion were asked of the court by the Council of the League of Nations in a matter affecting the interests of the United States and in a case where we had not consented that such request should be made we should have a very disturbed condition of public opinion in this country, and the prestige of the court would be seriously affected, even if the court after consideration were to do what it did in the Eastern Carelia case and refuse to give any opinion at all. For that reason, Mr. President, I for one strongly favor a reservation which will declare it to be not within the competence of the court to give an opinion in that case, quite agreeing with the Senator from Montana that that will operate only upon the jurisdiction of the court as a legal proposition, but being also confident that it will have the practical effect of leading the Council of the League to refrain from asking any opinion in such a case of a court which would have no jurisdiction to comply with the request.

It seems to me, Mr. President, that that is the reconciliation of the controversy that has just taken place. Whether we trace the origin of the jurisdiction to give advisory opinions to the thirty-sixth article of the statute, or whether we trace it to the fourteenth article of the Covenant of the League, in either event it seems to me that the court ought, so far as we are concerned, to be deprived of its competence to respond to a request for advice in any matter where we have a *direct interest* unless we are of a mind to submit the question.

Senator Pepper's opinion was strengthened by a memorandum presented by Senator Borah from a "well known international jurist" whose name he was "not at liberty to mention" because he "is in official life." This jurist thought no "prudent statesman" could rely on the Carelia case alone, asserted "there is not the slightest reason to suppose that any other country . . . would deny the request of the United States to be treated as an equal," and insisted that reservation 5 in its existing form is "worse than futile." It is based on a misapprehension because the statute does not mention advisory opinions. "It is solely from Article 14 of the Covenant of the League of Nations that the court derives its power to give such opinions; and by Article 14 only the Council or the Assembly can ask for such an opinion. . . . It is not only opposed to the dictates of ordinary prudence but places the United States in a subordinate and helpless position. This is not in the interest of the court. On the contrary it is likely to end in a catastrophe." The memorandum also refers to the propriety of a "reservation prohibiting the giving of confidential advice," and concludes with the following proposed reservation: [22]

> That, in acting upon requests for advisory opinions, the court shall not, under any circumstances, depart from the essential rules guiding its activity as a judicial tribunal but shall give notice and open hearings to all interested parties, and shall in each case freely determine, in the exercise of its own judgment, whether it can, in keeping with its judicial character, properly answer the question put to it, and what shall be the nature and form of its response; that in no case shall the court give any confidential advice but shall announce its opinions publicly, together

[22] Cong. Rec., Vol. 67, pp. 2293–2294.

with the opinions of dissenting judges; that the court shall not give an opinion on a question to which the United States is a party without the consent of the United States; and that the United States disclaims all responsibility for any opinion on any question to the submission of which the United States was not a party.

The Swanson reservation in its final form was introduced on January 23, 1926,[23] and though incorporating the ideas of Senator Pepper and the unknown jurist, it appears to go farther than either, for it bars advisory opinions not only when the United States is "directly affected," has a "direct interest" or "is a party," but also when it "claims an interest." The source of this addition is not disclosed by the debate, though the significance of the reservation is explained by both Senators Walsh and Lenroot in terms which are not wholly consistent with each other. Mr. Walsh thinks it gives the United States equal power with members of the Council to control advisory opinions, while Senator Lenroot seems to think it merely assures the United States the usual right of a state not to be subjected to any jurisdiction without its consent, though his use of the word "claimed" goes beyond this.[24]

MR. WALSH. Under the Covenant of the League of Nations, each of the great nations has a representative upon the Council of the League; and any one of them, therefore, because the Council proceeds by unanimity, can prevent the submission to the court of any request for an advisory opinion, which it does not want to have submitted. This gives to the United States exactly the same power by denying to the court the jurisdiction to entertain a request for an advisory opinion with respect to any question concerning which the United States claims an interest. . . .

MR. LENROOT. Mr. President, I desire to supplement what the Senator from Montana has said in just one respect.

The change in reservation No. 5 merely carries out and insures and makes permanent, so far as the United States is concerned, the rule of the court laid down by its own decision in the Eastern Carelia case; so that hereafter, even though, as contended by the opponents of the court, new elections might change the complexion of the judges and a different rule might obtain, in no event, at any time, or under any circumstances, can any advisory opinion be rendered, affecting the rights or interests of the United States, or claimed to affect our rights or interests, without the consent of the United States.

There is nothing in these reservations that is not entirely in harmony with the Harding-Hughes-Coolidge recommendations.

The Senate having acted, Secretary Kellogg forwarded on March 2, 1926, a copy of its resolution to the Secretary General of the League of Nations and to all the signatories of the protocol, asking the latter "to inform me in writing whether they will accept the conditions, reservations and understandings contained" therein.[25] On March 18, the League Council adopted a suggestion of Sir Austen Chamberlain, British representative. This suggestion noted that since the protocol was a multilateral instrument, the American conditions should be embodied in a similar instrument and not

[23] Cong. Rec., Vol. 67, p. 2656. [24] *Ibid.*, p. 2679.
[25] League of Nations, Official Journal, Vol. 7, p. 829.

in a series of separate exchanges of notes. Further it pointed out that some of the American conditions affect the rights of the present signatories established by a ratified instrument which by usual practice could not be varied by a mere exchange of notes. Finally it drew attention to the fifth reservation which "is capable of bearing an interpretation which would hamper the work of the Council and prejudice the rights of members of the League, but it is not clear that it was intended to bear any such meaning." In view of these considerations, the Council's resolution proposed that the governments of the signatory states inform the United States of their difficulties and that on invitation of the Council they all meet with the United States at Geneva on September 1, 1926, to arrange a new agreement giving satisfaction to the United States.[26] These invitations were forwarded on March 29, and on April 17 Secretary Kellogg declined for the United States because the Senate reservations "are plain and unequivocal, and according to their terms, they must be accepted by the exchange of notes between the United States and each one of the forty-eight states signatory to the statute before the United States can become a party and sign the protocol." He had no authority to change this procedure, saw no difficulty in it, and thought it would be a matter of regret if the Council "should do anything to create the impression that there are substantial difficulties in the way of such direct communication." He thought that no new agreement was necessary, but that acceptance of the American reservations by the signatories would constitute such an agreement. "If any machinery is necessary to give the United States an opportunity to participate through representatives for the election of judges, this should naturally be considered after the reservations have been adopted and the United States has become a party to the statute." On the other hand, he had no objection to the signatories conferring among themselves if they wished.[27]

Five of the signatories (Cuba, Greece, Liberia, Albania and Luxemburg) replied that they had already accepted the American reservations, and two (San Domingo and Uruguay) favored such acceptance, but forty of them (all except Brazil, Cuba, Haiti, Bolivia, Colombia, Costa Rica, Paraguay and Salvador, the last five of which had not yet ratified the protocol) accepted the Council's invitation, and the conference was held in the room of the Governing Body of the International Labor Office at Geneva from September 1 to 23, 1926.[28]

Jonkheer W. J. M. van Eysinga of the Netherlands was elected chairman, and M. Cesar Zumeta of Venezuela, and Sir Francis Bell of New Zealand, vice-presidents. Six public sessions were held, at which the views of the

[26] League of Nations, Official Journal, Vol. 7, p. 536.

[27] *Ibid.*, Vol. 7, p. 721; Monthly Summary, Vol. 6, p. 91.

[28] Extracts from the replies of the signatories and the other correspondence leading up to the conference were submitted to the members of the conference by the Secretary General on August 25, 1926. League of Nations, Doc. C. S. S. C. 22.

delegates were freely expressed and agreement in principle was reached.[29] A committee of fourteen then held private sessions to work out a practical plan. M. Pilotti of Italy presented this committee's report to the conference on September 23.[30] It was adopted and embodied in a final act [31] signed by the delegates, which each agrees to make the basis of its reply to the United States. This final act includes a preliminary draft of a protocol to serve as a basis of negotiation with the United States. If satisfactory, its general signature and ratification would make the American reservations and the conference's interpretation of them legally effective.

The conference was confronted with the tasks (1) of ascertaining the meaning and effect of the American reservations, (2) of deciding the policy to adopt toward them, and (3) of proposing a procedure for effecting that policy.

1. With the first four reservations and the first half of the fifth there was little serious difficulty, though a number of interesting points of international law arose.

The first reservation, which guarded the United States from any legal relation to the League or obligation under the Treaty of Versailles, was considered declaratory of the necessary situation of a non-member of the League,[32] and the possibility of adherence to the court by a non-member is expressly foreseen by the protocol.[33]

The second reservation, which permitted the United States to participate in the election of judges, though perhaps raising some procedural difficulties, was considered wholly reasonable in principle.[34] Some expressed the opinion that it involved an amendment to the Covenant,[35] but that hardly seems warranted. The powers of the Council and Assembly in selecting judges flow from the statute, not from the Covenant, which does not mention

[29] The present writer attended the debates and utilized the *Compte rendu stenographique* (C. S. S. C./Ire sess./C. R.) for the following extracts.

[30] Conference of States Signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, Report by M. Pilotti, Publications of the League of Nations, 1926, V, 25. The committee consisted of the President, two vice-presidents, M. Rolin (Belgium), Sir Cecil Hurst (Great Britain), Sir George Foster (Canada), M. Fromageot (France), M. Pilotti (Italy), M. Yoshida (Japan), M. Rostworowski (Poland), M. Osusky (Czechoslovakia), M. Unden (Sweden), M. Buero (Uruguay), M. Dinichert (Switzerland).

[31] Conference of States Signatories, etc., Final Act of the Conference, Publications of the League of Nations, 1926, V, 24. Printed in Supplement to this JOURNAL, p. 1.

[32] Remarks of M. Rolin of Belgium, *Compte rendu*, 1st sess., p. 9. This follows from the principle that a state cannot be bound by a treaty to which it is not a party. Roxburgh, International Conventions and Third States, 1917, p. 29; Wright, this JOURNAL, Vol. 11, pp. 568–575.

[33] *Supra*, note 1.

[34] Remarks of M. Rolin and Sir Cecil Hurst, *Compte rendu*, 1st sess., pp. 10, 12.

[35] M. Van Eysinga, Chairman, 1st sess., p. 10.

the matter at all; so a utilization of American delegates by the amended statute in the electoral process is no more a modification of the Covenant than is the utilization of the national groups of the Hague Court of Arbitration in the nominating process. The common practice of enlarging the functions of international institutions by treaties outside of their organic acts and even with different parties seems not to have been fully understood either here or in the United States Senate.[36] Thus there is no need to look to Article 4, par. 5, or Art. 17 of the Covenant for authority to enlarge the Council *ad hoc* as suggested by M. Rolin.[37] Authority can be given the Council to act alone or in company with American representatives by the court statute or any other treaty so long as the activity is within the broad competence of the Council and Assembly to deal with "any matter within the sphere of action of the League or affecting the peace of the world." [38] There can be no doubt but that any assistance to the court established in accordance with Article 14 of the Covenant would be within this competence.

The third reservation, by which the United States agreed to share in the expenses of the court, was looked upon by the conference as a favor rather than a request [39] and caused no discussion, though strictly it would appear to give the United States an advantage over other signatories. The latter's financial burdens are "decided by the Assembly upon the proposal of the Council" (Art. 33), while the United States determines its fair share by discretionary action of Congress.

The fourth reservation caused more discussion. With respect to the American right to withdraw, three opinions were expressed. Some thought the right of denunciation was to be assumed in all multilateral conventions, and thus the American reservation merely declared a right belonging to all.[40] Others, though admitting the doctrine for non-members of the League, insisted that League members, who were bound to the court not only by the statute but also by Article 14 of the Covenant, could not denounce the stat-

[36] See Wright, this JOURNAL, Vol. 20, pp. 457–460; *Compte rendu*, 1st and 6th sess., and remarks of Senator Borah, Cong. Rec., Dec. 18, 1925, Vol. 67, p. 1075.

[37] *Compte rendu*, 6th sess., pp. 6–8, and comment of M. Osusky of Czechoslovakia thereon, *ibid.*, p. 8.

[38] "There is nothing to prevent the parties from accepting obligations and from conferring on the Council powers wider than those resulting from the strict terms of Article 15 (of the Covenant)." Advisory Opinion in the Mosul Case, Publications of the Per. Ct. of Int. Justice, Ser. B, No. 12, p. 27. "The right of the Council of the League of Nations to make a recommendation when requested by one or several of its members is not explicitly laid down in Article 11 of the Covenant but is implied, I may say by the whole Covenant." Viscount Ishii, Report on the Upper Silesian Question, Minutes of Extraordinary Session of the Council, Aug. 29 to Oct. 12, 1921, p. 7. See also League of Nations, Official Journal, Vol. 2, pp. 982, 1221, and Wright, this JOURNAL, Vol. 20, p. 458. The limits of this principle are discussed by the writer, this JOURNAL, Vol. 20, pp. 277, 460. See also *infra*, note 51.

[39] *Compte rendu*, 1st sess., p. 13.

[40] M. Osusky of Czechoslovakia, *ibid.*, 1st sess., pp. 13, 20.

ute without withdrawing from the League.[41] This argument, however, is weakened by the fact that the court statute, though passed by the League organs, became binding for each state only upon ratification, and as a result several members of the League are not yet parties to the court protocol. Thus it is difficult to make any legal distinction between League and non-league members with respect to the court. A third opinion, and the one ultimately accepted, held that under general international law a treaty cannot be unilaterally denounced, unless it expressly so stipulates. As neither the court protocol or statute contains a denunciation clause, as do the Hague Conventions and the League of Nations Covenant, they cannot be denounced.[42] Thus the United States reservation, if accepted, would give that country a privilege not enjoyed by the present parties with reference to each other. Would they not, however, have that privilege with reference to the United States under general international law? The Norwegian delegate thought so,[43] and there seems to be much to support him. Treaties are presumed to be equal and reciprocal.[44] Thus courts have held that a state is not entitled to the privileges of a multilateral convention which by its reservation it refuses to others.[45] Is the reverse true, that a state must grant to others with respect to itself whatever privileges it has acquired by reservations? [46] Interesting results would follow from this principle. As

[41] M. Rolin of Belgium, *ibid.*, 1st sess., p. 16; M. Erich of Finland, *ibid.*, p. 18, and M. Pilotti of Italy, *ibid.*, 2nd sess., p. 5.

[42] M. Castberg of Norway, *ibid.*, 2nd sess., p. 9; MM. Rolin and Pilotti seem to have come to this opinion, *ibid.*, p. 11.

[43] *Ibid.*, 5th sess., p. 19.

[44] Vattel, *Le Droit des Gens*, liv. ii, sec. 301, Carnegie Endowment ed., p. 213; Hyde, International Law, Vol. 2, p. 71. "In doubtful cases that construction is to be adopted which will work the least injustice—which will put the contract on the foundation of justice and equity rather than of inequality." Livingston, Sec. of State, to Baron Lederer, Nov. 5, 1852, Moore, Digest of International Law, Vol. 5, p. 251. "It is a general principle of construction with respect to treaties that they shall be liberally construed so as to carry out the apparent intention of the parties and secure equality and reciprocity between them." Field, J., in Geofroy *v.* Riggs, 133 U. S. 258, 271 (1890).

[45] *The Marie Glaeser*, L. R. (1914), P. 218, 1 Lloyd, 107. This principle was specified in the protocol of deposit of ratifications of the African Slave Trade General Act of 1890. "It is understood that the Powers which have ratified the general act in its entirety . . . shall not be bound toward those which shall have ratified it partially, save within the limits of the engagements incurred by the latter Powers." Malloy, Treaties, etc., p. 1900; Miller, Reservations to Treaties, p. 99; Wright, Minnesota Law Review, Dec. 1919, pp. 25, 29; Control of Am. Foreign Relations, p. 51.

[46] Great Britain attached the understanding to the International Sanitary Convention of 1903 "that the right to give notice of termination of the present convention, as also the right of the Powers to concert concerning amendments in the text of the convention subsists, as was the case with the Convention of Venice of 1897." The *proces verbal* of the deposit of ratifications of April 6, 1907, says: "The signatory Powers have made the following double declaration which is, moreover, in conformity with the stipulations contained in the Convention of Venice of March 19, 1897, viz.: 'That the contracting Powers reserve the right to agree with one another with regard to the introduction of modifications in the text of the

the United States proposes to make its adherence in a separate exchange of notes with each signatory and reserves the right to withdraw that adherence, reciprocally each state which accepts the American adherence without qualification would have the right to withdraw that acceptance. But the Senate resolution declares that the "signature of the United States to the protocol shall not be affixed" until the signatories have indicated through an exchange of notes their acceptance of the reservations. If the United States signed under these conditions, what would be the effect of the withdrawal by one signatory of its acceptance of the American reservations? Would it mean that the President of the United States, acting under the Senate resolution, would have to withdraw the American adherence? With this interpretation the United States, after joining the court, could be put out of it by the action of any one other party. If this would be the effect of unqualified acceptance of the Senate resolution, the conference's actual proposal that the signatories could withdraw their acceptance by a two-thirds vote limits their own powers rather than those sought by the United States in the resolution.[47]

The second part of the fourth reservation, prohibiting amendments without the consent of the United States, also called forth different opinions. Some expressed a vague notion that the League Assembly could amend the statute,[48] and others feared the United States's veto would continue even if the United States exercised its right to withdraw.[49] But eventually general agreement was reached that under international law a treaty can only be amended by unanimous consent of the parties. Thus the reservation is merely declaratory of a right which the United States would, and all other parties to the protocol do, enjoy anyway.[50]

It may be noted, however, that while a treaty cannot be amended if any

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present convention and that each of these Powers preserves the right to denounce the present convention, which denunciation shall not have effect except with regard to it," (Malloy, Treaties, etc., Vol. 2, pp. 2127, 2130.) David Hunter Miller, Reservations to Treaties, p. 124, comments that a comparison of these documents "discloses the very interesting fact that the declaration of Great Britain *at signature*, regarding the denunciation or modification of the convention, was adopted by all the Powers upon deposit of ratifications and thus made *general* in character. This is an illustration of a very important principle, namely, that a reservation made by one Power at signature may be adopted by and for others upon ratification; in other words, no Power need contract with any other on a basis different from that, as limited by a declaration, which the deposit of its instrument of ratification will accept as to the declaring Power."

[47] *Infra*, note 75.

[48] M. Markovitch of the Serb-Croat-Slovene State, *Compte rendu*, 1st sess., p. 18, 2nd sess., p. 13.

[49] Sir George Foster of Canada, *Compte rendu*, 1st sess., pp. 25–26, and comments thereon of Sir Cecil Hurst, *ibid.*, 2nd sess., p. 19, and of M. Van Eysinga of Netherlands, 2nd sess., p. 15.

[50] M. Osusky, *ibid.*, 1st sess., pp. 14, 20; M. Dinichert of Switzerland, *ibid.*, 1st sess., p. 22; M. Buero of Uruguay, 2nd sess., pp. 6–7; M. Rolin, 2nd sess., p. 12.

of the parties object, nothing prevents some of the parties making a new treaty which modifies its provisions among themselves, so long as they do not encroach upon the rights of the others. This is in fact a common practice. The three Hague Conventions of 1899 were all superseded by Hague Conventions of 1907 as to the parties to the latter. In each case, however, some of the 1899 signatories failed to ratify the corresponding 1907 convention, and the result is that those states continue bound only by the 1899 convention. This is simply an illustration of the principle already referred to, that the functions of international institutions are generally subject to change with respect to the agreeing states by new conventions.[51] So long as treaty-making is a matter of unanimous consent and ratification, this principle is almost necessary if modifications are ever to be made at all. Suppose, the United States having adhered, a conference were held for modifying the court statute. All the parties, including the United States, sign certain amendments. The United States's reservation and general principles of international law mean that none of these amendments can come into effect until the United States and all the other parties have ratified. Experience shows that the prospect of getting such unanimous ratification in any reasonable time would be extremely slight.[52] Thus, some multilateral conventions like the League of Nations Covenant expressly provide for amendment by less than unanimity (Art. 26). But the court statute, like the Hague Conventions, has no such provision. Thus it appears that the procedure used in the latter will be followed. Amendments found necessary by experience will not be proposed as such, but new conventions will be made which can at once become effective for such states as ratify them. Non-ratifying par-

[51] *Supra*, notes 36, 38. This can not affect the rights under the old convention of states that have not ratified the new one. Thus Art. 91 of I Hague Convention 1907 provided that this convention should replace "as between the contracting Powers" the 1899 convention. Art. 31 of the Geneva Convention, 1906; Art. 4 of IV Hague Convention 1907 and Art. 25 of X Hague Convention 1907, provide the same and add: "The convention of 1864 (or 1899) remains in force as between the Powers which signed it and which do not also ratify the present convention." See Renault's report on X Hague Convention 1907, Scott, Reports of the Hague Conferences, p. 722. See also, Art. 11, Pan American Industrial Property Convention, 1910; Art. 12, Pan American Trade Mark Convention, 1910; Arts. 15, 18, Industrial Property Convention, 1911; Art. 160, Sanitary Convention, 1912; Art. 13 of Act revising Berlin (1885) and Brussels (1890) Acts, 1919; Art. 11, Liquor Traffic Convention, 1919; Art. 25 Arms Traffic Convention, 1919; Art. 31, Opium Convention, 1925. A similar provision was included in Art. 8 of the draft Slavery Convention of 1925 but was eliminated in the convention as signed in 1926 because it was thought some of the provisions of the Berlin (1885) and Brussels (1890) Acts might still be valuable even for parties to the new convention where the provisions did not conflict. See remarks of Lord Cecil, League of Nations Assembly, Sept. 25, 1926.

[52] See remarks of Viscount Cecil in Seventh Assembly of League of Nations, 6th Plenary Meeting, Sept. 9, 1926. An annex to the report of the Secretary General to the Seventh Assembly disclosed the inadequate ratification which multilateral conventions negotiated under the League and the International Labor Office have received. The same is true of conventions negotiated under the Pan American Union.

ties could of course object if their rights under the existing treaty were impaired, and this would prevent fundamental modification by this process, but if their rights are not impaired and the new convention affects only the parties to it, there would seem to be no grounds for protest.

The first part of the fifth reservation, which assures publicity, notice and hearing for advisory opinions, merely codifies the existing practice of the court, and the provision with regard to publicity which had not appeared in the original rules of court has been given additional security by incorporation in the rules adopted by the court on July 31, 1926 (Arts. 73–74). The conference was willing to assure the permanence of these practices by treaty. A question arose whether the phrase "render an advisory opinion" included the court's deliberations as well as the announcement of its opinion, but the conference was convinced it did not. The usual practice of private deliberation by the court in formulating its opinion would not be impaired so long as the opinion was "rendered" in public.[53]

The last part of the fifth reservation occupied the major part of the discussion, and three lines of interpretation were presented. Some thought, judging from Senator Walsh's remarks which were quoted, that the United States wished equality with members of the Council in controlling requests for advisory opinions.[54] If the Council could only make such requests by unanimous vote, the absolute American veto which appears to be reserved would give the United States no more than equality. But it was not certain that a request for advisory opinions required unanimity. In fact some thought it was a matter of procedure which required only a majority vote. It was urged that this matter of League constitutional law must be decided before an answer could be given to the United States and that the court itself should be requested to advise on it.[55] Sir Cecil Hurst of Great Britain, however, pointed out that even if unanimity were required it could hardly be more than the qualified unanimity referred to in Article 15 of the Covenant, which would not give a veto to members of the Council parties to a dispute.[56] In fact, it seems probable that the character of the vote requesting an advisory opinion depends upon the character of the question asked. If advice is asked in a procedural question perhaps the request requires only a majority, if on a dispute before the Council a qualified majority, and if on some other question an absolute majority.[57]

[53] See remarks of M. Markovitch, M. Van Eysinga and Sir George Foster, *Compte rendu*, 2nd sess., p. 17.

[54] Count Rostworowski of Poland, *ibid.*, 3rd sess., p. 2; M. Fromageot of France, p. 4; M. Rolin of Belgium, p. 9, who quoted statement of Senator Walsh, *supra*, note 24; and M. Pilotti of Italy, p. 22.

[55] M. Rolin, *ibid.*, 3rd sess., p. 12.

[56] *Ibid.*, 3rd sess., p. 34, citing request for advisory opinion of court in Mosul case, and remarks of M. Osusky, 3rd sess., p. 40. See also Wright, this JOURNAL, Vol. 20, p. 461, and Miller, Columbia Law Review, Vol. 26, p. 659.

[57] M. Fromageot, *Compte rendu*, 3rd sess., p. 28. See also M. Scialoja, of Italy, in League

A second group of speakers insisted that even if the United States formally was claiming only the same powers as a member of the Council, it was in substance claiming much more because of its freedom from League responsibilities and League participation. Thus said Sir Francis Bell of New Zealand: [58]

> Assuming it to be the fact that the Council must be unanimous in preferring a request for an advisory opinion, it is not true that on that assumption the fifth reservation does not demand and grant an exceptional privilege and right to the United States, for "power" is not synonymous with "right"; one word is not the expression of the other. I do not want to use the word "demand," but this is a proposal for the concession and admission of a right by the United States to veto any proposal for reference for an advisory opinion which in their opinion is inadvisable from their point of view as affecting their interest. Now that right which they ask to be conceded and admitted is not a right which is possessed by any Power now a member of the Council. Assuming the necessity for unanimity, any member of the Council could veto the reference of any question, but it is not true that any member has the right to do so. Such an exercise of the power of veto would be absolutely contrary to the spirit of the Covenant of the League. The members of the Council are not there to guard the interests of their respective countries and to prevent the discussion of matters which might affect their respective countries; the members of the Council are there to guard and govern the interests of the League and of all the nations. If a state not now represented on the Council were to seek election and that country were to declare by its representative that, if elected, it was going to exercise its power of veto to prevent discussion and prevent advice to the Council on any matter affecting the interests of that country, what chance would it have of being elected to the Council? If a country which has a permanent seat on the Council used its veto on the advisory opinion question—assuming it to have the veto—for the purpose of preventing discussion or decision of matters affecting the interests of that country, it would break up the League.

It was further pointed out that the American reservation was not addressed to the Council but to the court. After the Council had requested the opinion, the United States reserved the power to forbid the court giving it. Thus it did not ask a power equal to that of a single member of the Council, but to the council as a whole. That this might seriously hamper League business was emphasized by Sir Cecil Hurst: [59]

> The representative of a state on the Council, who is in a position to exercise a vote, and thereby to exercise a right of veto in a matter which requires a unanimous decision, must of necessity himself participate in the meeting of the Council and there exercise the vote. The great advantage of this is that before any vote is exercised which might have the effect of operating as a veto, it must at least be done after all the difficulties of the situation have been explained; after, in fact, the representative of that state has had the advantage of knowing the difficulties of the question with which the League of Nations is faced. . . . If,

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of Nations Council, Official Journal, Feb. 1926, pp. 127–128; McNair, The Council's Request for an Advisory Opinion from the Permanent Court of International Justice, British Year Book of International Law, 1926, pp. 1–13, who thinks a request for an advisory opinion must be absolutely unanimous even when it relates to a dispute on which the Council can recommend with qualified unanimity, unless the request "merely relates to the procedure or method to be adopted by the Council in settling the dispute."

[58] *Compte rendu*, 4th sess., pp. 46–47. See also Sir Cecil Hurst, *ibid.*, 3rd sess., p. 33.

[59] *Ibid.*, 3rd sess., pp. 37–38.

without participating in any way in the meeting of the Council at which a decision is taken, the Government of the United States claimed the right to interpose a veto in cases where unanimity was required, that would indeed be to confer on the United States something very different from that which was enjoyed by states which are members of the League. It would indeed give to the United States a privileged position, and that, to my mind, is something to which it is not reasonable the other states should agree, nor one which I could believe the United States desire.

Sir George Foster, from Canada, went even further and thought the court could not give any advisory opinion until the United States had given affirmative consent, which in his opinion would require action by two-thirds of the Senate. Thus every request for an advisory opinion would be delayed until the President and two-thirds of the Senate formally declared that the United States had no interest.[60] This interpretation seems doubtful. The court could assume that the United States neither had nor claimed an interest unless the United States made such a claim within a reasonable time after the notice was sent to it. Now in American constitutional practice, the President has the sole initiative in foreign correspondence. Thus the American veto under the reservation could only be exercised by the President. He would neither be obliged to consult the Senate nor to follow its advice if he did.[61]

A third line of interpretation which, on the whole, seems to conform more closely with the Senate debate, was based on the Eastern Carelia case. Said M. Negulesco of Roumania:[62]

Mention had been made of a privilege being granted to the United States, but he did not agree with everything the speakers had said about that special privilege. It seemed to him that the question should be envisaged from a different point of view. The privilege, if any, should be considered not from the point of view of states members of the League, but from the point of view of states non-members of the League. . . . Under Article 14 of the Covenant the states members of the League who had signed the Protocol were under obligation not to oppose the court when the court gave an advisory opinion. Moreover, the signing of the protocol gave them the right to appear before the court if they so desired. A distinction must be made between the obligations under Article 14 of the Covenant not to oppose the court, and on the other hand the right to appear before the court if the United States so desired.

The position of the United States was that under reservation No. 1 they desired to remain foreign to the activities of the League. They wanted to retain the position of non-members. If this were borne in mind, there should be no confusion between the right of appearing before the court and the obligation not to oppose the opinion of the court. All the United States wanted was the optional right to appear before the court, and they did not subscribe to the obligations of the article of the Covenant whereby states undertook in any case to accept the jurisdiction of the court. They had had an illustration of that in the case of Eastern Carelia when the Soviets declined to appear before the Council or the court, and the court decided it could not give an opinion if the Soviets did not think fit to appear. . . .

On behalf of Rumania he declared that his country would willingly accept the reservation

[60] *Compte rendu*, 4th sess., pp. 39–42.

[61] Miller, Col. Law Rev., Vol. 26, pp. 665–666; Wright, The Control of American Foreign Relations, pp. 21–40, 279, 341.

[62] *Compte rendu*, 5th sess., pp. 27–29.

in question if it were read in the sense that the United States simply desired to retain and exercise the same right as that of other non-member states on the footing of equality. The interpretation should be the same as that given in the case of Eastern Carelia.

With this interpretation the reservation is based on the recognized principle of international law that submission of disputes to arbitration or a court is based on mutual consent. Arbitration treaties generally recognize it by barring cases "concerning the interests of third parties." The difficulty of this interpretation, however, is in the use of the phrase "claims an interest." The Eastern Carelia case merely barred an advisory opinion where a state that really had an interest withheld its consent to the jurisdiction, and the court itself would decide what states really had an interest. As M. Rolin said:[63]

> The difficulty, however, lay in the word "claims." The United States was asking not only for the right to intervene when there was a question of an advisory opinion being given on a question concerning her, but she was asking that the very fact of intervention, without any proof that she actually had an interest, should in itself be regarded as preventing the court from giving an advisory opinion. The question was whether the conference could go as far as that?
>
> Sir George Foster had reminded them yesterday that the reservation of the United States was addressed not to the Council or the Assembly but to the court. It was, however, impossible to declare the court incompetent. Neither any member of the League nor the whole of them together could do that. They could appear before the court and explain their views, but they could not declare the court incompetent to give an advisory opinion.

The paragraph of the Senate resolution following the fifth reservation related only to procedure, and raised no question of principle, though there seemed to be general recognition that acceptance of the reservations would in fact modify the statute of the court with respect to all the parties, and this could only be effected by a ratified instrument.

The two concluding paragraphs related to the constitutional competence of the President and Senate and the foreign policy of the United States. They apparently were thought to have no effect on the rights and duties of the other parties and were not discussed by the conference, although the Senate resolution appears to make their tacit, if not express, acceptance a condition of adherence.[64]

2. The attitude of the various states toward the American reservations can only be judged from the debates, the report of the committee, the resolutions finally adopted, and to some extent from private conversation with the delegates. Three points stood out.

All of the delegates were anxious to have the United States adhere to the protocol, as it would increase the prestige and value of the court, though

[63] *Compte rendu*, 5th sess., p. 5.

[64] They are called understandings rather than reservations, but to be legally effective they would have to be accepted by the other parties to the treaty. Wright, Minn. Law Rev., March, 1919, pp. 16–18; Control of American Foreign Relations, pp. 45–52.

some were willing to make more concessions than others.[65] There was also a general realization that it would be politically difficult to get the United States Senate to modify its resolution.

None of the delegates were willing to seriously interfere with the present working of the court and the League. The advisory procedure was considered valuable and there was no inclination to weaken it.[66] The small states especially looked upon the advisory jurisdiction as a protection, and some of them hoped that resort to it by majority vote of the Council might prove to be the practice.

Finally there was an extreme reluctance to create special privileges. Some of the delegates were thinking of the probable adhesion of Germany to the protocol in the near future, and perhaps eventually that of Russia. If special privileges were given to the United States, it would be hard to refuse them to others. This point of view was emphasized by the representatives of the large states.[67]

Was it possible to reconcile these policies with the American reservations? Four plans were suggested. M. Rolin of Belgium proposed to ascertain precisely the powers with respect to advisory opinions of the members of the

[65] The small states, especially the Latin American states, seemed most anxious to have the United States adhere. The Pilotti committee reported: "The greater the number of States which have acceded to the Court the greater will be the Court's authority. It is to the interest of the States which founded the Court that all the other States of the world should agree to become parties thereto even if they feel unable to become members of the League of Nations. In particular, the possibility of the accession of the United States of America, as a state mentioned in the Covenant of the League of Nations, was provided for in the Protocol of Signature of the Statute of the Court. It therefore seems quite natural that the States signatories of the Protocol, in the presence of a proposal—even a conditional proposal—by the United States of America to accede to the Court, should adopt a favorable attitude."

[66] At the meeting of the Federated League of Nations Societies at Aberystwyth, Wales, in July, 1926, anxiety was displayed by several speakers at the possibility of weakening the League and the court's procedure. See League of Nations News, New York, August, 1926, p. 10. The Final Act says in relation to reservation 5: "Great importance is attached by the members of the League of Nations to the value of the advisory opinions which the court may give as provided for in the Covenant. The conference is confident that the Government of the United States entertains no desire to diminish the value of such opinions in connection with the functioning of the League of Nations. Yet the terms employed in the fifth reservation are of such a nature as to lend themselves to a possible interpretation which might have that effect. The members of the League of Nations would exercise their rights in the Council and in the Assembly with full knowledge of the details of the situation which had necessitated a request for an advisory opinion, as well as with full appreciation of the responsibilities which a failure to reach a solution would involve for them under the Covenant of the League of Nations. A state which is exempt from the obligations and responsibilities of the Covenant would occupy a different position."

[67] In regard to requests for advisory opinions where the United States is not a party, the Pilotti report said, "The reply can only consist in a declaration by the signatory states recognising the United States of America as enjoying equality with the states members of the League represented in the Council or the Assembly."

Council before answering.[68] Sir Cecil Hurst of Great Britain proposed an interpretation of the reservations in the sense of equality with members of the council.[69] M. Unden of Sweden proposed a counter-reservation giving the signatories the right to withdraw acceptance of the American adherence in case a satisfactory procedure for the exercise of the American powers under the fifth reservation could not be agreed upon,[70] and M. Casteberg of Norway endorsed the idea but thought the result would follow from general principles of international law without an express reservation.[71] Finally, a proposal to negotiate an executive agreement establishing a procedure to ascertain the American opinion on a proposed request for an advisory opinion before the Council had decided upon it, was published in the Geneva press by Mr. Theodore Marburg, former United States Minister to Belgium, and considered by the conference.[72]

It was concluded that the terms of the American resolution, whatever may have been its real intent, carried such grave possibilities of weakening the whole institution of advisory opinions that it could not be accepted without some safeguard. This safeguard was found in an interpretation according to the British proposal and a counter-reservation according to the Swedish proposal.[73] With these safeguards the Senate resolution was accepted. The interpretation applied only to the fifth reservation, and that was accepted unequivocally so far as it related to requests for advisory opinions in which the United States had an interest, but in so far as it related to advisory opinions in which the United States only claimed an interest but did not, in the opinion of the court, really have one, the effect would not necessarily be a veto, but precisely the effect of an adverse vote by a member of the Council or Assembly. Thus the United States was in reality given a privilege beyond that enjoyed by either members or non-members of the League, because it would have the powers of both. It would have the power of members in controlling court action on advisory opinions in which it had no interest, and also the right of non-members to prevent court action in cases where it had an interest. This latter power does not belong to members of the League because by acceptance of Article 14 of the Covenant they have agreed in advance to permit advisory opinions properly requested by the Council or Assembly. Even a member of the Council, if it is a party to the dispute, is by that very fact deprived of an effective vote in controlling requests for advisory opinions.[74] An interest in the case which assures a non-member a veto deprives a member, whether permanent or *ad hoc*, as in the case of Turkey in the Mosul case, of a veto.

[68] *Compte rendu*, 3rd sess., p. 12.
[69] *Ibid.*, 3rd sess., p. 36.
[70] *Ibid.*, 4th sess., p. 31.
[71] *Ibid.*, 5th sess., p. 19.
[72] See League of Nations News, New York, Aug. 1926, pp. 8–10, and statement by M. van Eysinga, *Compte rendu*, 5th sess., p. 34.
[73] See report of M. Pilotti and Final Act, *supra*, notes 30, 31.
[74] *Supra*, note 56, but see *supra*, note 57.

As a protection against the possible unreasonable exercise of the special privilege given the United States, M. Unden's suggestion was adopted. A counter-reservation permits each signatory to withdraw its acceptance of the second part of the fourth and the fifth reservations, with the effect of terminating the protocol of American adherence if such action is taken by two-thirds of the parties other than the United States within a year. This seems no more than a fair reciprocal application of the American power to withdraw, and in fact is perhaps less than international law would have given without express reservation.[75]

3. The procedure for effecting these proposals was not considered at length in the public debate, but occupied much attention in the committee.

There have been cases where reservations to multilateral conventions presented on deposit of ratifications have been tacitly accepted,[76] but generally they have been expressly accepted.[77] Thus the American request for express acceptance is not unreasonable and was recognized by the signatories.

Greater difficulty, however, was presented by the question of ratification. Could the American reservations be accepted by the signatories without resubmission to their ratifying authorities? It was thought not. They in fact modified the terms of the statute. Thus it was considered necessary to draw up a special protocol for general signature and ratification by the usual process.[78] The suggestion was made that the modifications should be incorporated in the statute itself, but it was pointed out that this would raise new difficulties in case the United States should ever exercise its right to withdraw.[79]

Though it was thought the reservations could only be accepted by a ratified document, formulation of the procedure for American exercise of the powers there given was left to executive agreement. It is the usual practice to leave the details of treaty execution to unratified agreements or exchanges

[75] *Supra*, note 47.

[76] A reservation to the Hague Convention, 1907, made on deposit of ratifications by the United States, seems to have been accepted tacitly. Wright, Minn. Law Rev., 1919, p. 23; Control of American Foreign Relations, pp. 48–52; Miller, Reservations to Treaties, pp. 145; Scott, Reports to The Hague Conferences, pp. xxvii–xxviii. Some multilateral conventions expressly forbid reservations. This was true of the Declaration of Paris (1856), and of London (1909). Wright, Control of Am. For. Rel., p. 49.

[77] Wright, Minn. Law Rev., Dec. 1919, p. 21–22; Miller, Reservations to Treaties, p. 160; Malkin, "Reservations to Multilateral Conventions," British Year Book of International Law, 1926, p. 159.

[78] Where reservations or interpretations have not been accepted by the full ratifying authority of one party, their validity has often been questioned, as was true of diplomatic interpretations of the Treaty of Guadaloupe-Hidalgo (U. S.-Mexico, 1848) and the Clayton-Bulwer Treaty (U. S.-Great Britain, 1850). Wright, Minn. Law Rev., Dec. 1919, p. 22; Control of American Foreign Relations, p. 48; Miller, Reservations to Treaties, pp. 80–87.

[79] Sir Cecil Hurst, *Compte rendu*, 6th sess., pp. 12–13.

of notes,[80] and Secretary Kellogg, in his letter of April 17, 1926, had suggested that consideration of "machinery to give the United States opportunity to participate through representatives for the election of judges" be deferred until the United States had become a party to the statute. Though the signatories seem to have found no need for supplementary agreement on this matter, they did on the matter of advisory opinions. Because of the non-participation of the United States in the ordinary work of the Council and Assembly, they attached great importance to the manner in which the United States gave its consent to advisory opinions, and suggested that this should form the object of an understanding between the United States and the Council of the League "which would ensure that the peaceful settlement of future differences between members of the League of Nations would not be made more difficult." [81] This understanding could be reached by executive agreement.

Comparing the Senate debates and the debates and Final Act of the conference, there seems to be little separating them. There is nothing in the Senate debate to indicate that the United States as a non-member of the League wishes to interfere with advisory opinions where it has nc interest. Certain Senators, it is true, opposed advisory opinions altogether, but they were a small minority. The desire of the majority apparently was only to protect the interests of the United States as a non-member. Thus, the issues are: What is an American interest? and What authority will decide whether a particular claim of interest is founded?

The United States undoubtedly has an interest in the protection of its rights. An opinion which might affect American territory or property, an American officer or citizen, or the reputation and good name of the United States, would clearly involve an American interest. The United States would in fact be a party, and, under the Eastern Carelia case, American refusal to appear would bar an advisory opinion. The Final Act says, with respect to cases where the United States is a party, "the jurisprudence of the court as formulated in this case seems to meet the desire of the United States," but apparently the Senate wished to give this jurisprudence the additional sanction of a treaty.[82] Since the signatories manifested no objection to the principle of the Eastern Carelia case, they would probably be willing to incorporate it in the proposed protocol. This could be done by adding a paragraph at the beginning of Article 4 of the proposed protocol in somewhat the following language: [83]

[80] Wright, Control of American Foreign Relations, pp. 106, 236; Crandall, Treaties, Their Making and Enforcement, pp. 117–120.

[81] Final Act of the Conference, p. 7. See also par. 1, of Art. 4 of the draft protocol, and par. 8 of the Pilotti committee's report.

[82] See remarks of Senators Pepper and Lenroot, *supra*, notes 13, 24.

[83] This is believed to contain the essence of the following language of the court: "It is well established in international law that no state can, without its consent, be compelled to

> Even in giving advisory opinions, the court shall not depart from the principle of international law that no state can, without its consent, be compelled to submit its disputes with other states to any kind of pacific settlement.

The United States also has an interest in certain traditional policies such as the Monroe Doctrine. Here it would be more doubtful, but the general acceptance of the second understanding in the Senate's resolution would give the United States a good chance to prove its interest to the court if the facts really involved the Monroe Doctrine.[84]

Finally, the United States, along with all other states, doubtless has an interest in the interpretation of international law and treaties to which it is a party. But most advisory opinions would require some such interpretation. Thus, if the United States claimed an interest under such circumstances, and its claim barred an opinion, it would destroy the institution of advisory opinions altogether. Such a claim would, however, stretch the

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submit its disputes with other states either to mediation or to arbitration, or to any other kind of pacific settlement. Such consent can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary, also be given in a special case apart from any existing obligation. The first alternative applies to the members of the League who, having accepted the Covenant, are under the obligation resulting from the provisions of this pact dealing with the pacific settlement of international disputes. As concerns states not members of the League, the situation is quite different; they are not bound by the Covenant. The submission, therefore, of a dispute between them and a member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent. . . . The court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The court being a court of justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activities as a court." Publication of the Per. Ct. Int. Jus., Ser. B, No. 5, pp. 27–29. In giving a decision on the claims of Costa Rica and Salvador that Nicaragua had violated their rights by concluding the Bryan Chamorro Treaty with the United States, the Central American Court of Justice seems to have neglected this principle, because the United States, whose treaty rights would clearly be effected by the decision, had not submitted to the jurisdiction. For the court's argument for assuming jurisdiction, see this JOURNAL, Vol. 11, pp. 212, 699, and Ralston, International Arbitral Law and Procedure, 1926, pp. 149, 152. The court did, it is true, refrain from declaring the nullity of the treaty "because that would be equivalent to adjudging and deciding respecting the rights of the other party signatory to the treaty without having heard that other party and without its having submitted to the jurisdiction of the court" (*ibid.*, Vol. 11, pp. 228, 729), but apparently giving any decision at all did not, as suggested by the unknown jurist (*supra*, note 22), prove to the interest of the court, but ended in a catastrophe for it.

[84] Apart from the second understanding attached to the Senate resolution, the Monroe Doctrine is specifically referred to in Article 21 of the Covenant. See Wright, The distinction between legal and political questions with especial reference to the Monroe Doctrine, Proc. Am. Soc. Int. Law, 1924, pp. 61–67.

term interest far beyond its usual meaning in such a context as this. Such a meaning clearly cannot be intended by the arbitration treaties which bar "cases concerning the *interests* of third parties," nor has it been accepted by the court.[85]

But suppose the United States does claim an interest on this ground, as it might if the question related to the scope of the domestic jurisdiction of some State in immigration or tariff control. Even if the court refused to recognize this as an interest barring the opinion under the Eastern Carelia case, the conference's interpretation of the reservation would bar the opinion in cases where the request of the Council or Assembly can only be made by unanimous vote, and the question whether it is absolute or qualified unanimity would not be important, for if the United States were a party and its vote were excluded in counting qualified unanimity in the council,[86] that very fact would make its veto absolute as a non-member under the Eastern Carelia case. Thus the only requests for opinions on which the American veto would not be effective are those in which a majority of the Council or Assembly can make the request. If there are any such cases, they are probably only those dealing with procedure within the League of Nations,[87] in which the United States, as a non-member, could hardly claim an interest.

Although the conference of signatories accepted all the American reservations "in principle," as recommended by the Pilotti committee, and introduced but slight modifications in their application, these modifications are probably sufficient to require a new submission to the United States Senate.[88] This would naturally take the form of submitting the proposed protocol for its advice and consent, but before such submission, negotiations would seem desirable in order to perfect the instrument, especially by incorporating the principle of the Eastern Carelia case. Such negotiations might be carried on by individual correspondence with each of the signatories, or by summoning a new conference at which the United States would attend.

[85] See arbitration treaty, United States-Great Britain, 1908. In the Wimbledon Case the Permanent Court of International Justice distinguished between Articles 62 and 63 of the Statute, both of which permit a state to intervene in proceedings, the first if it can prove to the court's satisfaction "an interest of a legal nature," and the second if it is a party to a treaty to be construed by the court. Presumably only interveners of the first type could stop proceedings, under the principle of the Carelia Case, by refusing to submit to the jurisdiction because under Art. 59, the second type of interveners are not bound by the construction and so their rights are unaffected unless they intervene. Publications of the Per. Ct. of Int. Jus., Ser. A, No. 1, p. 13.

[86] *Supra*, note, 56.

[87] *Supra*, note, 57.

[88] In 1800, after Napoleon had made a counter-reservation to the Senate's reservation to the treaty of amity and commerce, President Jefferson eventually decided that the treaty would have to be resubmitted to the Senate. Malloy, Treaties, etc., Vol. 1, p. 505; Hayden, The Senate and Treaties, pp. 123–124; Miller, Reservations to Treaties, pp. 13–14; Wright, Control of American Foreign Relations, p. 45; note 77.

President Coolidge, however, said on November 11:

> While no final decision can be made by our government until final answers are received, the situation has been sufficiently developed so that I feel warranted in saying that I do not intend to ask the Senate to modify its position. I do not believe the Senate would take favorable action on any such proposal, and unless the requirements of the Senate resolution are met by the other interested nations, I can see no prospect of this country adhering to the court.

With the United States committed to the policy of a world court by long tradition [89] and to joining this court by planks in both major party platforms, by presidential utterances and by resolutions of both houses of Congress,[90] it would seem surprising if it allows its policy to be frustrated by the slight margin of disagreement which remains without further negotiation.

RESOLUTION OF UNITED STATES SENATE ADVISING AND CONSENTING TO ADHERENCE OF THE UNITED STATES TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE, JANUARY 27, 1926.

Whereas the President, under date of February 24, 1923, transmitted a message to the Senate, accompanied by a letter from the Secretary of State, dated February 17, 1923, asking the favorable advice and consent of the Senate to the adherence on the part of the United States to the protocol of December 16, 1920, of signature of the statute for the Permanent Court of International Justice, set out in the said message of the President (without accepting or agreeing to the optional clause for compulsory jurisdiction contained therein), upon the conditions and understandings hereafter stated, to be made a part of the instrument of adherence: Therefore be it

Resolved (*two-thirds of the Senators present concurring*), That the Senate advise and consent to the adherence on the part of the United States to the said protocol of December 16, 1920, and the adjoined statute for the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said statute), and that the signature of the United States be affixed to the said protocol, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution, namely:

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Treaty of Versailles.

2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses of the court as determined and appropriated from time to time by the Congress of the United States.

4. That the United States may at any time withdraw its adherence to the said protocol and that the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

5. That the court shall not render any advisory opinion except publicly after due notice to all States adhering to the court and to all interested States and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of

[89] See letter of Secretary of State Hughes, *supra*, note 2.

[90] *Supra*, notes 3, 5, 7, 10.

the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

The signature of the United States to the said protocol shall not be affixed until the powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to the said protocol.

Resolved further, As a part of this act of ratification that the United States approve the protocol and statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other State or States can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and

Resolved further, That adherence to the said protocol and statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall adherence to the said protocol and statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions. (Cong. Rec., Vol. 67, p. 2306; Sen. Doc. 45, 69th Cong., 1st sess.)

THE FIFTH YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE[1]

By Manley O. Hudson
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In the course of its fifth year, the Permanent Court of International Justice has builded a record of constructive work which may perhaps excite less interest than the records of previous years but which constitutes a substantial addition to the new foundations of international jurisprudence which the court is laying. The judges were at The Hague for two sessions: the tenth (extraordinary) session from February 2, 1926, to May 25, 1926, and the eleventh (ordinary) session from June 15, 1926, to July 31, 1926. It is notable that all of the eleven judges were present at the latter session, for the first time in the history of the court. At the extraordinary session early in the year, the court handed down its seventh judgment, and at the ordinary session during the summer, its thirteenth advisory opinion. In addition, the court undertook the very important task of revising its rules of procedure, and the experience of the past four years has been embodied in the new Rules of Court which became effective as from July 31, 1926. Outside the chambers of the court itself, some questions have arisen which may affect its future; so that on the whole, it has been a significant year in the court's history.

THE CASE CONCERNING CERTAIN GERMAN INTERESTS IN UPPER SILESIA[2]

On August 25, 1925, the court gave a judgment on the preliminary objections made by Poland relating to its procedure and jurisdiction in the case brought against Poland by Germany, concerning the expropriation of certain German interests in Upper Silesia. At that time the pleas made by Poland were dismissed and Germany's application of May 15, 1925, was declared to be admissible and reserved for judgment on the merits.[3] On the same day, the German Agent filed an additional application, which the court decided, on February 5, 1926, to allow to be joined to the original.[4] The dates fixed by the President for the filing of the documents of the written proceedings, as later changed to meet the desire of the Polish Agent, were as follows: for the applicant's case, September 16, 1925; for the respondent's

[1] Continuing the series of articles on the work of the court begun in this Journal in January, 1923.

[2] For a fuller summary, see Publications of the Court, Series E, No. 2, pp. 109–138.

[3] See the comment by the writer in this Journal, Vol. 20, pp. 15–19 (January, 1926).

[4] The decision was formalized in the usual way. See Publications of the Court, Series A, No. 7, pp. 94–96.

counter-case, November 28, 1925; for the applicant's reply, December 26, 1925; and for the respondent's rejoinder, January 23, 1926. Count Rostworowski again sat as Polish national judge, and Professor Rabel as German national judge. Hearings were held by the court on February 5–11, and on February 16–26, and expert witnesses were examined[5] from April 13 to April 16. The judgment[6] was handed down on May 25, 1926.

The submissions of the German Agent first sought a declaration of the court as to the relation of the Polish law of expropriation of July 14, 1920, extended to Upper Silesia by the law of June 16, 1922, to Articles 6 to 22 of the Geneva convention between Poland and Germany, as well as to Articles 92 and 297 of the Treaty of Versailles. Ambiguity in the submission as first drafted was to some extent cleared away by amendments. The court's power to give judgment on this submission was denied by Poland, on the grounds that no such power had been conferred by the Geneva convention and that an abstract declaration could not be given by the court. But the court was of opinion that a dispute existed over which jurisdiction had been given to it by Article 23 of the convention; and it was held that such provisions for the court's jurisdiction clearly "cover interpretations unconnected with concrete cases of application." The Statute of the Court (Art. 63) foresees the possibility of a judgment having a "purely declaratory effect." Proceeding then to an analysis of the provisions of the Geneva convention, it was held that under the convention "the treatment accorded to German private property, rights and interests in Polish Upper Silesia is to be the treatment recognized by the generally accepted principles of international law," subject to the express provisions for expropriation. But the Polish law of July 14, 1920, was not thus limited, in that it subjected private property to measures prohibited by the convention and failed to provide for preliminary investigation of titles. Poland claimed to have under the Treaty of Versailles certain rights, unconnected with the Geneva convention, which justified the law; but the court held that such rights could not be based upon the armistice agreements entered into before Poland became a state, nor upon Article 232 of the Treaty of Versailles of which Poland derived no benefit, nor upon Article 256 of the latter treaty. Rights acquired by individuals prior to the actual transfer of sovereignty to Poland, *i.e.*, prior to January 10, 1920, were entitled to protection. Poland had failed to show any source of international law which enabled her to escape from the provisions of the Geneva convention, and the application in Upper Silesia of certain articles of the law of July 14, 1920, would not be in conformity with the convention.

The second submission by Germany sought judgment that the attempted

[5] It was the first time that witnesses have been called before the court. For the method of their examination and cross-examination, see Publications of the Court, Series E, No. 2, p. 11.

[6] Publications of the Court, Series A, No. 7.

expropriation of certain property called the Chorzow factory was not in conformity with Article 6 of the Geneva convention; and in consequence of such judgment the court was asked to say what attitude should have been adopted by Poland in regard to the companies that owned this property. This latter rôle was declined by the court, although in expectation of the submission of data which might enable it to give such a declaration it had previously held itself competent. The property had been alienated by the German Government in 1920, after the Treaty of Versailles had come into force, under a contract made late in 1919; but the court held that the German Government did not thereby "overstep the limits of the normal administration of public property" and had not abused its rights or acted "contrary to the principles of good faith." Nor could the transaction be successfully attacked by Poland in this court as invalid under the German municipal law. The ownership of the Chorzow factory being established, Poland was bound to respect it and had failed to do so.

Germany's third submission related to notices which had been served of Poland's intention to liquidate certain rural estates, and judgment was sought that these notices were not in conformity with the provisions of the Geneva convention. Poland asked that Germany be non-suited with reference to this submission. The Geneva convention had provided (Art. 9) that "rural estates which are devoted principally to serving the needs of large industrial undertakings (dairy farming estates, timber raising estates, etc.) shall be considered, for the purposes of this article, as forming part of the undertakings the requirements of which they serve," and therefore subject to special provisions for expropriation. A question arose in argument as to certain areas of surface lands owned by mining industries and held as a safeguard against subsidence. It was on this point that the court heard expert witnesses, and the conclusion was reached that such surface lands could in some cases be treated as part of the industrial undertakings in applying the convention. The court went carefully into the facts with reference to each of the ten estates in question. As to five of the estates, the German contention was upheld; it was dismissed as to four of them; and as to one, the declaration of the Polish Government's intention not to proceed deprived the German claims of any object. In some of the cases, the notice itself was found to be defective for want of particularity. With regard to the estates of the *Vereinigte Königs-und Laurahütte Company*, a serious question arose because a majority of the shares of the company were owned by non-nationals of Germany, and gave rise to an interesting part of the opinion dealing with the disregard of the corporate fiction. In another case the commune of Ratibor was held to be a "German national" as that term was used in the convention. With reference to the estates of the Duke of Ratibor and Count Saurma-Jeltsch, a difficulty arose because the new frontier between Germany and Poland divided their estates; it was necessary to say where

they were domiciled, and the opinion contains the following interesting comment on the conception of domicile:[7]

> The characteristic feature of domicile is the fact that from the point of view of law, a person is attached to a particular locality. This locality is normally—as the term "domicile" itself implies—the home, the house inhabited by the person concerned. If the whole—perhaps very considerable—extent of an estate could be regarded as domicile, the precise localization of the legal rights and obligations of a person, which is the most essential feature of domicile, would be lacking. It is possible to have more than one domicile, but it is out of the question that the same domicile should be in two different localities, in two communes, or even in two different States.

All of the judges[8] concurred in the final opinion, except the Polish national judge, Count Rostworowski, who filed a dissenting opinion. Lord Finlay, in his separate "observations," expressed the view that Poland is entitled to the benefit of the Armistice of November 11, 1918, as "the Allied States made the Armistice on behalf of Poland, which was about to become a State, as well as on their own behalf;" but he changed his original opinion that the Protocol of Spa, of December 1, 1918, had nullified the transfer by the Reich of the Chorzow factory.

CONFERENCE OF THE INTERNATIONAL LABOR ORGANIZATION

The first three advisory opinions given by the court at the request of the Council of the League of Nations related to questions which had arisen in connection with the work of the International Labor Organization set up as an autonomous part of the League of Nations by Part XIII of the Treaty of Versailles and corresponding parts of other peace treaties.[9] In the course of the work of the Organization during the past two years, a fourth question arose which has now been made the subject of the court's thirteenth advisory opinion,[10] handed down on July 23, 1926.

At the sixth session of the International Labor Conference, in 1924, one item on the agenda, the inclusion of which had not been objected to, was "Night-work in bakeries." Following the usual course, a draft convention on this subject was elaborated by the conference, which would have prohibited the night-work in bakeries "of all persons, including proprietors as well as workers," but which would not have covered baking "done by members of the same family for their own consumption." This draft was objected to by members of the employers' group in the conference, because it was deemed to be an attempt to regulate the night-work of the employer

[7] Publications of the Court, Series A, No. 7, p. 79.

[8] Six judges, three deputy-judges, and two national judges participated. A seventh judge, Judge Weiss, was forced by illness to retire from the case.

[9] See the writer's comment in this JOURNAL, Vol. 17, pp. 18–23 (January, 1923).

[10] Publications of the Court, Series B, No. 13.

himself. On July 5, 1924, the proposed draft convention was referred for final vote to the seventh session of the conference, and on June 8, 1925, at the seventh session, the conference adopted the draft convention in a modified form which still covered the night-work of employers in bakeries. Thereafter, the objection of the employers' group was maintained in the Governing Body of the International Labor Office, and at its thirteenth session the latter adopted the following resolution:

> The Governing Body of the International Labor Office, having before it a request of the Employers' Group for the submission to the Permanent Court of International Justice of the question of the jurisdiction of the International Labor Organization in regard to the personal work of the employer, decides, although the majority considers that the International Labor Organization is competent in the matter to which the request refers, and declaring that the present decision shall not constitute a precedent, to transmit the request to the Council of the League of Nations in application of Article 14 of the Treaty of Peace, and to state the question to be referred to the court as follows:
>
> "Is it within the competence of the International Labor Organization to draw up and to propose labor legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself?"

This resolution was communicated by the Director of the International Labor Office to the Secretary General of the League of Nations, on February 3, 1926; and on March 12, 1926, the Council voted to request the court to give an advisory opinion on the question formulated.

On receipt of the request, notice was given by the Registrar of the court to all members of the League of Nations and to the United States and Ecuador as states mentioned in the annex to the Covenant[11] as well as to the International Labor Organization, the International Organization of Industrial Employers, the International Federation of Trades Unions, and the International Confederation of Christian Trades Unions. Public hearings were held by the court on June 28 and 29, 1926, at which the International Labor Organization was represented by M. Albert Thomas, the International Organization of Industrial Employers by MM. Borel and Lecocq, the International Federation of Trades Unions by M. Mendels, and the International Confederation of Christian Trades Unions by M. Serrarens. Various memoranda and documents were also submitted to the court.

The judges were unanimous in the opinion promptly given on July 23, 1926, of which the English text is authoritative. They took it to be clear that the court was not asked to give an opinion "as to the existence of any general power to regulate work done by the employer." They dealt only with the case where legislation proposed for the protection of the worker or wage-earner would incidentally regulate the same work when performed by

[11] It seems that communication with the Hedjaz, which is also mentioned in the Annex to the Covenant, has been discontinued.

the employer himself. The question put to the court was held to be "manifestly a question of law," depending on the interpretation of a treaty, in connection with which the court deemed itself "called upon to perform a judicial function." The provisions of Part XIII of the Treaty of Versailles were carefully examined, with the conclusion that "the High Contracting Parties clearly intended to give to the International Labor Organization a very broad power of coöperating with them" for the assurance of humane conditions of labor. Both by inference and by express provision, the Organization is "not excluded from proposing measures for the protection of wage-earners because they may incidentally regulate the personal work of the employers." The convention of 1906 prohibiting the use of white phosphorus in the manufacture of matches, could be cited as a precedent; and the convention concerning the use of white lead in painting, drawn up by the International Labor Conference and already ratified by at least eleven states, is an example of such a measure. The reasoning of the court itself in its third advisory opinion, was also cited. The court had not been called upon to say whether any specific proposal for the regulation of the personal work of the employer would be primary rather than incidental, and it refused to go outside the actual question put to it. The answer to that question was clear: "That it is within the competence of the International Labor Organization to draw up and to propose labor legislation, which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself."

The opinion was read in open court, and copies were at once communicated to the various governments. On June 7, 1926, the Council of the League of Nations had already voted that the opinion should be formally sent to the Director of the International Labor Office without delay, after it had been communicated personally to the members of the Council.[12] Again the court has contributed to the progress of international coöperation by settling a point of what may be called international constitutional law.

STATES MAINTAINING THE COURT

The Statute of the Court is adjoined to the Protocol of Signature of December 16, 1920, which has now been signed by forty-eight members of the League of Nations, of which thirty-seven have ratified it. Since August 21, 1926, the Irish Free State is to be listed as a forty-ninth signatory which has ratified, as a result of the signature originally effected on behalf of the British Empire.[13]

The "optional clause" for accepting the court's compulsory jurisdiction as envisaged in Article 36 of the Statute, has been signed by twenty-five

[12] League of Nations, Official Journal, July, 1926, p. 857.

[13] A communication to this effect was made to the Secretary General of the League of Nations, on behalf of the Irish Free State, on August 21, 1926. See League of Nations Monthly Summary, Nov. 15, 1926, p. 244.

states subject to various conditions.[14] The latest addition to this list is Ethiopia, which signed on July 12, 1926, and deposited its ratification on July 16, 1926.[15] The signature of Belgium, which had been affixed on September 25, 1925, was ratified on March 10, 1926. Some of these twenty-four states which had accepted the compulsory jurisdiction for a period of five years, have recently renewed their acceptances: thus, Denmark on December 11, 1925, accepted for another period of ten years, and deposited a ratification of this acceptance on March 28, 1926; Sweden on March 18, 1926, renewed her acceptance for ten years, without any condition of ratification; and Switzerland on March 1, 1926,[16] renewed her acceptance for ten years, subject to ratification.

THE COURT'S JURISDICTION

In addition to the jurisdiction conferred upon the court by the states which have signed the "optional clause" referred to in Article 36 of the Statute, the court has been given extensive jurisdiction by various general and special treaties.[17] The various treaties for the protection of racial, religious and linguistic minorities, and the mandates for various territories falling under Article 22 of the Covenant of the League of Nations, contain special provision for the jurisdiction of the court. The Mavrommatis case brought by Greece against Great Britain was due to a clause in the mandate for Palestine, for example. In addition, it has become a regular practice to include such provision in general multipartite treaties negotiated under the auspices of the League of Nations. The Slavery Convention, opened for signature[18] at Geneva on September 25, 1926, is the latest instance; it contains (Art. 8) the following provision:

> The High Contracting Parties agree that disputes arising between them relating to the interpretation or application of this Convention shall, if they cannot be settled by direct negotiation, be referred for decision to the Permanent Court of International Justice. In case either or both of the States Parties to such a dispute should not be parties to the Protocol of December 16th, 1920, relating to the Permanent Court of International Justice, the dispute shall be referred, at the choice of the Parties and in accordance with the constitutional procedure of each State, either to the Permanent Court of International Justice or to a court of arbitration constituted in accordance with the Convention of October 18th, 1907, for the Pacific Settlement of International Disputes, or to some other court of arbitration.

Moreover, numerous bilateral treaties are now made to contain provision for some kind of reference to the court. Nineteen such treaties are listed as

[14] For the list, see Publications of the Court, Series E, No. 2, pp. 77–81.

[15] See League of Nations Document, C. L. 98, 1926, V.

[16] The Government of the Netherlands has also instituted procedure for renewing its acceptance.

[17] See the list in Publications of the Court, Series E, No. 2, pp. 49–76.

[18] Signed, up to October 16, 1926, by the representatives of 56 Powers.

having been made during 1925.[19] Many of these treaties are mainly concerned with arbitration and conciliation, in which field the lead has been taken by Switzerland. The Swiss-Roumanian treaty[20] of February 3, 1926, is an example of the liberal provision made in the Swiss treaties for the jurisdiction of the court. On May 20, 1926, the German and Netherlands Governments signed an arbitration treaty which provides for possible reference to the court. These are but examples of what has now become a frequent practice. They mean that the court has become so imbedded in the world's treaty law that it is impossible to think of the world getting along without it in the future.

REVISION OF THE RULES OF COURT

It had been decided on June 17, 1925, that the question of revising the Rules of Court adopted on March 24, 1922, should be placed on the agenda for the ordinary session of 1926. The judges were asked to submit to the President, before December 31, 1925, their suggestions for amendments, and a report upon all the suggestions submitted was then made by the President, so that the task of revision could be undertaken when the session began on June 15, 1926.

The revised rules[21] took effect as from July 31, 1926. The numbering of the articles has not been changed, but amendments have been introduced into thirty-one of the seventy-five articles. In many cases they effect but slight variations in administrative details; in other cases the modification is more significant. It is interesting to note that in the new Article 31, it is provided that the judges shall vote in their deliberations "in an order inverse to the order of precedence," a practice which may to some extent be said to prevail in the United States Supreme Court. The new Article 38 makes elaborate provision for the filing of preliminary objections in contested cases. Article 54 now provides that the reports of statements made by agents or counsel shall be communicated to them for correction or revision. Article 59 has liberalized the procedure with regard to intervention before the court. By Article 62, each judgment must state the number of the judges constituting the majority. Article 66 has elaborated new provisions for the possible construction of judgments, and requires the court's decision on requests for revision or interpretation to be given in the form of a judgment. Articles 71, 73 and 74, relating to advisory procedure, have been modified to incorporate the actual practice which the court has been following even under the scant provisions of the old rules. Article 73, especially, now provides for opportunity for public hearing in connection with advisory opinions, though perhaps the French and English texts do not quite correspond; and Article 74 adds to the previous requirement that advisory opin-

[19] See Publications of the Court, Series E, No. 2, pp. 73–75.
[20] See European Economic and Political Survey (Paris), Feb. 28, 1926, p. 9.
[21] Now included in the Publications of the Court, Series D, No. 1, pp. 33–65.

ions be published, the requirement that they be read in open court. The popular impression that these latter amendments are in some way due to the position taken by the United States may or may not be correct, but the new provisions were designed merely to describe what has been the procedure followed from the beginning.

THE COURT'S FINANCES AND ADMINISTRATION

The financial condition of the court continues to be very satisfactory.[22] The budget estimate for 1926 was 931,238.32 florins; for 1927, it has been increased to 1,029,177.83 florins. This increase is largely due to the fact that after the experience of 1925, allowance has been made for a total of four sessions and 240 days of session, whereas previous budgets were based upon a forecast of three sessions of a total duration of 200 days. At the beginning of 1926, the court had cash in hand and in the bank to the amount of 25,085.25 florins.

The work of the court has proved so heavy that it has become necessary to create a new administrative post of Deputy-Registrar. The first incumbent of this post, whose appointment dates from January 1, 1926, is M. Paul Ruegger, First Secretary of Legation of the Swiss Confederation.

THE COURT'S PUBLICATIONS

From the point of view of the jurist and of the scholar, the scheme of the court's publications has proved very satisfactory. During the year 1926, several notable additions have been made, besides the periodical continuance of the various series. The Statute of the Court and the Rules of the Court as amended on July 31, 1926, have now been published in a volume which is classified as Series D, No. 1, the place of which has heretofore been filled by the publication of the Intermediary International Institute. This new volume includes the texts of both the original and the amended Rules of Court, and of the various resolutions of the Assembly of the League of Nations which form part of the court's organic law. The format is not very convenient, but otherwise the volume is most useful.

During the year, also, there appeared the second annual report, covering the period from June 15, 1925 to June 15, 1926, published as Series E, No. 2. It follows the lines of the first annual report issued in 1925. The following may be especially noted among its inclusions: the Staff Regulations, as modified on January 1, 1926; and a bibliographical list of official and unofficial publications concerning the court, prepared by M. Douma, Assistant Librarian of the Carnegie Library of the Peace Palace. The latter contains 1299 entries, and as the most complete bibliography of the court in existence it will henceforth be indispensable to students.

[22] See Publications of the Court, Series E, No. 2, pp. 201–207.

THE COURT'S RECORD TO DATE

In the course of five years, the court has achieved a position which few informed persons would have predicted for it in the beginning. Firstly, the complicated system of electing the judges has worked, and with surprising ease the great obstacle which delayed the establishment of the court has been surmounted. Secondly, the court has had much more to do than was generally expected in 1921. In five years, it has handed down seven judgments and thirteen advisory opinions, a larger volume of business than that of the Permanent Court of Arbitration in twenty-six years. In a twenty-first case—that of the expulsion of the Oecumenical Patriarch—the mere fact of reference to the court influenced a settlement out of court. Thirdly, in five years the court has been forced to hold eleven sessions; whereas, the Statute envisaged but one ordinary session each year. Fourthly, judges have been chosen and have established methods and procedure which have brought the court confidence and prestige. The large number of cases referred to it, as well as the large number of treaties extending its jurisdiction, bespeaks the attitude of the governments of various states. With such a beginning, it is surely permissible for one to hope that a cumulating jurisprudence is being established which in time will give new foundation and fresh vigor to international law.*

* For information on the proposed adherence of the United States to the Permanent Court of International Justice, see the preceding article in this JOURNAL by Quincy Wright.—MANAGING EDITOR.

DISARMAMENT[1]

By Maj. Gen. Tasker H. Bliss
U. S. Army (retired), Governor of the U. S. Soldiers' Home

These two careful and elaborate studies of the problem of disarmament have attracted wide attention among its students in Europe and the United States. Both have appeared in the year in which probably more definite thought than ever before has been given to the subject by men earnestly striving to find the entrance to some path that may lead to the solution. These volumes plainly show that the writers—than whom no one can have thought more deeply—are convinced that it is not a problem for abstract reasoning. It is not like an equation in mathematics where the application of definite rules leads to one exact conclusion. In such a problem, if there are unknown factors, they are inert things; they are subjected, without evoking protest, to any sort of torturing process of analytical reasoning to determine their value, and that being done the problem is solved. But in this other problem the factors are living, sentient things; human beings acting of themselves in the mass or under the influence of individuals; swayed by every sentiment of the mind, fear, suspicion, greed, ambition, and by the highest and purest as well; sentiments perhaps dormant at one time, at another in intense activity, sometimes thinking and reasoning and again appearing as a wild outburst of senseless passion, and at all times subject to direction towards purposes good or ill according to the character of some guiding mind. No wonder that so many think it a waste of time to study the problem at all while, at the best, it seems to be one the solution of which can be arrived at only by a long slow process of empiricism.

The work of M. de Lavallaz, like the two preceding ones of Hans Wehberg, of which it is, in a way, a continuation, is valuable to the student for the wealth of facts which it gives, showing the never ceasing and increasing interest which the most advanced nations have taken in his subject. One half of his volume is an historical study on the general line taken by Wehberg. In this part he contents himself, in the main, with an analysis of the principal attempts, during the past two centuries and concluding with various propositions made during the World War, to secure some limitation of armaments by partial or general agreements. With a few words devoted to propositions made at the close of the Seven Years' War he considers in increasing detail that of the Czar Alexander I, the Anglo-American agreement on the

[1] *Essai sur le Desarmament et le Pacte de la Société des Nations.* Par M. de Lavallaz. Paris: Rousseau et Cie., 1926. pp. 505.

Disarmament. By Prof. P. J. Noel Baker. London: The Hogarth Press, 1926. pp. xiv, 352.

Great Lakes, the South American conventions of 1831–1840 and of 1902, the various attempts of Louis Philippe and Napoleon III, the two Conferences at The Hague, the Scandinavian Convention of 1905, the Anglo-German *pourparlers* of 1908–1912, and the general idea of disarmament appearing in various peace propositions made during the World War. The second half of his work is an analysis of the Covenant of the League made in the light of the Treaty of Versailles as a whole, and with a view to estimating its value as a stepping-stone towards a general and worth-while limitation of armaments.

For the details the student must refer to the author's work and those of Wehberg. Suffice it here to say that he comes to no constructive conclusion and the long series of failures which he reviews leave him apparently with no hope. Sooner or later in the relations of states he sees inevitable war. He says that "all the causes of conflict" which he has reviewed "combine, collectively and simultaneously, to create situations from which there is no hope of escape except by hostilities." There is certainly one hopeful conclusion which he might draw from his studies. The history of every advance that man has made is a history of failure preceding final success. When the minds of thinking, earnest men of every civilized state, Christian or otherwise, when these states themselves with increasing earnestness come back to this problem after every failure in its solution, the lesson of history and of reason is that the chance of its solution is vastly greater than that it will remain forever a failure. M. de Lavallaz evidently accepts in their full force the words in the preface, written by M. Rougier, to his work, "Tomorrow, as yesterday, the security of a people undoubtedly will depend essentially upon the vigilance of its government, on the prudence of its policy, on its firm will for peace *and on its ability to offer opposition to injustice.*"

This definition of security, such as has existed, has been and is true in its entirety; and it is because of its absolute futility, with special reference to the fourth condition expressed in the italicised words above, that the nations are and have long been seeking a better definition. Ability to oppose injustice is always counterpoised—it is the inevitable corollary to the law of unrestrained force—by ability to inflict it. At this moment there may be four or five nations in Europe, any one of which might, perhaps, have a fairly equal chance in opposing by its physical force injustice attempted to be inflicted on it by one of the other three or four. But as against one or another of these the other states have little chance. At this moment, of the 63 organized states of the world 57 would have little chance against deliberate aggression on the part of any one of some six states if the latter thought the aggression really worth their while. If the world must continue to rely upon the above fourth condition of security, there will be no security and no hope. It is to begin the substitution, in some slight degree at least, of a better condition of security that the world is now struggling. Doubtless there will be presented to this and following generations many more volumes recording this struggle and

its repeated failures before the world finds itself out of the labyrinth in which it is now entangled. Perhaps for the present we must content ourselves with what is implied in the somewhat despairing question with which M. de Lavallaz concludes his study: "How can we apply a remedy for the anarchy which threatens to submerge everything? Perhaps by a return to what caused the greatness of our civilization. Is Europe capable of finding a consciousness of its unity, of returning to the ancient and beneficent conception of Christianity from which it departed ages ago to its great harm and peril? Everything is in that." But, the present Europe has not departed from that conception, because it has never had it. Europe and the world has inherited, and necessarily so, a wrong conception from those very times of ancient Christianity. And from that conception it is now, fortunately, showing some desire and tendency to depart. *Everything is in that.*

Professor Baker's work proceeds on a different line. He writes having in mind the then approaching discussions of the Preparatory Disarmament Committee. He wanted to be helpful in reaching some concrete result. And his study must have been helpful to the Preparatory Committee in its recent work. Nevertheless his conclusions are indefinite, each comprising numerous alternatives, and are in the nature of suggestions for study rather than definite proposals urged for acceptance. Under the head of Aerial Disarmament he accepts the fact that "it is almost certainly not possible to limit the numbers or size of commercial aircraft," elsewhere admitting that within a negligible time they can be converted into efficient bombers. What is really gained, then, in respect of this all-important element, by limiting, as he recommends, the aircraft that may be maintained for national defense? As to the vexing problem of the "ratio," he fixes the principle on which he thinks it should be established but adds that if his "proposed solution seems too artificial . . . then some other more acceptable principle *must* be found instead." And so with Chemical Disarmament, Restriction of Weapons, Control of Potential War Production, Demilitarized Zones, International Control, etc., the author reasons to his own conclusions but suggests various others that may be possible. It is this which makes his work really constructive and valuable to the student.

But, taking these two works together, there is one basic conclusion to be drawn which neither draws in plain terms. Both establish premises which vitiate any practical conclusion. No one who believes with M. de Lavallaz that in the future as in the past the security of a people depends on its ability to resist injustice by its military power, can suggest any scheme of disarmament. But Professor Baker's premises lead to a conclusion disappointing to enthusiasts, but most helpful to serious students of the problem. He believes, first, as everyone does, that a scheme for general security must be worked out and made effective before the obligations imposed by Article 8 of the Covenant can be executed. He believes, second, that this general "security now means the provision of reasonable safeguards by the joint and

common action of the society of states against aggressive attack aimed at any one among them which has not itself been guilty of an intentional fault or misdemeanor." And it is hard to get away from that ultimate conclusion. This means that the coming of general disarmament will be slow and gradual. It makes it fairly certain that no imposing, elaborate scheme can be now drawn up that will have any hope of general acceptance.

In short, in what will the security of states against aggression consist? The genius and agelong experience of man has been able to devise only one answer—the substitution of force regulated by law, for unrestrained, arbitrary force. This will be brought about by increased numbers or extensions of such agreements as those of Locarno. But most of all will it result from the gradual formulation and acceptance of a code of international law which will define the rights and mutual duties of states, and a court to which infractions of this code may be appealed. And finally it will come with growth of the idea that resort to arbitartion or the court is not merely permissive. No state will effectively disarm so long as it knows that while its adversary in a quarrel may agree to resort to these methods it may also refuse.

Therefore, wise advocates of disarmament, while they seek for every palliative measure in this direction that can be secured, will also work for the most effective and general scheme of arbitration and the most efficient code of international law that the nations will formally accept. Until this is accomplished it is not likely that any plan for disarmament, even if accepted, will long endure.

THE RIGHT OF APPEAL IN NATURALIZATION CASES IN THE FEDERAL COURTS

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The Supreme Court of the United States, by Mr. Justice Brandeis, recently handed down its decision in Tutun *v.* United States, and Neuberger *v.* United States. This is the latest of the important Supreme Court cases determining the law of naturalization, of citizenship, and of expatriation.[1] During the past fifteen years they have comprised Johannessen *v.* United States,[2] Mansour *v.* United States,[3] Luria *v.* United States,[4] Maibaum *v.*

[1] Federal supervision of all naturalization began in 1906, under the administration of the Bureau of Naturalization. Problems involving both substantive and adjective law continually arise in practice. The Supreme Court has aided in the solution of a number of them. See footnotes 1 to 14.

Tutun *v.* United States, and Neuberger *v.* United States (April 12, 1926), 270 U. S. 568 (Advance Sheets), held: that the United States Circuit Courts of Appeals have jurisdiction to review by appeal a decree or order of a Federal District Court denying the petition of an alien to be admitted to citizenship in the United States.

[2] Johannessen *v.* United States (1912), 225 U. S. 227, held: that the provisions of Sec. 15, Naturalization Act of June 29, 1906, 34 Stat. 596, 601, to cancel naturalization certificates for fraud or illegality are constitutional and not *ex post facto*, such cancelation not being a punishment, and the authority not an unwarranted exercise of judicial power by the legislative branch of government; such certificates issued *ex parte* can be canceled for fraud, and the government is not estopped from impeaching naturalization where it did not appear at original proceedings; the naturalization law must be strictly construed against the alien applicant.

[3] Mansour *v.* United States (1912), 226 U. S. 604, affirmed the District Court's decree in United States *v.* Mansour (1908, 1909), 170 Fed. 671, 676, in which it was held: that a suit for cancelation of a certificate of naturalization under Sec. 15, *supra*, for fraud, is not one in which defendant is entitled as of right to a jury trial, and such section is not unconstitutional.

[4] Luria *v.* United States (1913), 231 U. S. 9, held: that the spirit of the naturalization laws has always required that if the applicant be admitted, he should be a citizen in fact as well as name, and bear the obligations and duties of citizenship as well as enjoy its rights and privileges; taking permanent residence in a foreign country within five years after naturalization has a bearing on the purpose for which naturalization was sought, and it is reasonable to presume that such action indicates absence of intention at the time of the application to reside permanently in the United States; Sec. 15, *supra*, making such residence a rebuttable presumption of intent not to reside permanently in the United States, is not unconstitutional as a denial of due process of law; such section, as to evidentiary effect of taking up such foreign residence, applies to naturalization certificates granted both under the Act of 1906, *supra*, and prior laws; Act of 1906, *supra*, not unconstitutional as making any act fraudulent or illegal that was honest and legal when done, or as imposing penalties; proceeding to cancel certificate under such section not a suit at common law but one in equity, and defendant not entitled to jury under seventh Amendment, U. S. Constitution.

Luria was naturalized in July, 1894, and in the following month removed to South Africa, where he resided and practiced medicine until December, 1910. He had returned in the

United States,[5] Mackenzie *v.* Hare,[6] United States *v.* Ginsberg,[7] United States *v.* Ness,[8] United States *v.* Morena,[9] Ozawa *v.* United States,[10] Yamashita *v.* Hinkle,[11] United States *v.* Thind,[12] Kaplan *v.* Tod,[13] and Toyota *v.* United States.[14]

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interim for but four or five months for the temporary purpose of taking a post graduate course. Therefore, the five-year period immediately subsequent to naturalization had run long prior to the Act of 1906, which Act was wholly retroactive as to Luria, but nevertheless sustained.

[5] Maibaum *v.* United States (1914), 232 U. S. 714, affirmed the District Court's decree in which it was held: that naturalization procured illegally by prejured testimony in 1900, was subject to revocation by a proceeding to cancel under Sec. 15, *supra*.

[6] Mackenzie *v.* Hare (1915), 239 U. S. 299, held: that the marriage in the United States in 1909 of a native-born American woman citizen with a subject of Great Britain who failed to become naturalized, was an act as voluntary and distinctive as expatriation, and was therefore tantamount to voluntary expatriation; Congress, without exceeding its power, had made it so by Sec. 3, Expatriation Act of March 2, 1907, 34 Stat. 1228 (since repealed by Sec. 7, "Cable" Act of September 22, 1922, 42 Stat. 1021, 1022).

[7] United States *v.* Ginsberg (1917), 243 U. S. 472, held: that a final hearing on a petition for naturalization in a judge's chambers adjoining the court room does not satisfy the requirement of Sec. 9, Act of 1906, *supra*, p. 599, that every final hearing be held in *open court;* every certificate of naturalization granted when prescribed qualifications do not exist, is subject to cancelation in independent suit brought by the United States.

[8] United States *v.* Ness (1917), 245 U. S. 319, held: that the filing of the certificate of arrival from the Department of Labor, showing the date, place, and manner of alien's arrival in the United States, required by subdiv. 2, Sec. 4, Act of June 29, 1906, *supra*, p. 597, where arrival is after that date, is an essential prerequisite to a valid order of naturalization; Sec. 11, *supra*, p. 599, conferring right upon United States to appear before any court in opposition to granting any naturalization petition, and Sec. 15, *supra*, authorizing United States to institute proceedings to cancel any certificate of citizenship illegally or fraudulently procured, are cumulative and not alternative protection against such procurement; an order entered where United States appeared under Sec. 11, *supra*, is not *res judicata* so that certificate cannot be set aside under Sec. 15, *supra*, as "illegally procured."

[9] United States *v.* Morena (1918), 245 U. S. 392, held: that the seven-year limitation on declarations of intention to become citizens, prescribed by subdiv. 2, Sec. 4, Act of 1906, *supra*, is applicable to those made before such Act was passed; it does not invalidate them, but the time begins to run upon them at the date of the Act.

[10] Ozawa *v.* United States (1922), 260 U. S. 178, held: that the Naturalization Act of 1906, *supra*, is not complete in itself, but is limited by Sec. 2169, U. S. Revised Statutes (1878), confining naturalization to aliens being white persons, those of African nativity, and persons of African descent; the words "white persons" in Sec. 2169, *supra*, import a racial and not an individual (color) test; a person of the Japanese race, born in Japan, is not eligible to naturalization under any circumstances.

[11] Yamashita *v.* Hinkle (1922), 260 U. S. 199, held: upon authority of Ozawa *v.* United States, *supra*, that persons of the Japanese race are not entitled, under Sec. 2169, *supra*, to become naturalized citizens of the United States; a court which renders a judgment purporting to naturalize a person whose ineligibility appears upon the face of the judgment, is without jurisdiction and the judgment is void.

[12] United States *v.* Thind (1923), 261 U. S. 204, held: that "free white persons," used in Sec. 2169, *supra*, are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood; cases of doubtful racial eligibility are to be dealt with by the

In Tutun *v.* United States, and Neuberger *v.* United States, *supra*, two cases joined and decided together, the point presented was whether the United States Circuit Courts of Appeals have jurisdiction to review a decree or order of a Federal District Court denying the petition of an alien to be admitted to citizenship in the United States, and, if so, whether the appropriate remedy is an appeal, or a writ of error. The Federal appellate courts in the First, Second, Third, Fourth, Seventh, Eighth, and Ninth Circuits had entertained jurisdiction to review original orders in naturalization cases. The right was denied in the Fifth and Third Circuits, and, later, in the Eighth.[15] In State appellate courts jurisdiction had been generally assumed,[16] though denied in a few instances.[17] It was decided in the Tutun

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"process of judicial inclusion and exclusion;" a high caste Hindu, of full Indian blood, born in Punjab, India, is not a "white person" within the meaning of Sec. 2169, *supra*.

[13] Kaplan *v.* Tod (1925), 267 U. S. 228, held: that a feeble-minded alien child, ordered excluded from the United States by the immigration authorities, who, while awaiting deportation, was in custody of an immigrant aid society, did not become a citizen under Sec. 2172, U. S. Revised Statutes, through naturalization of her father during her minority, as she could not lawfully have landed in the United States, and until she legally landed "could not have dwelt within the United States;" she was still in theory of law at the boundary line and had gained no foothold in the United States, never had been "dwelling in the United States," as required by Sec. 2172, *supra*, and still more clearly never had begun to reside permanently in the United States within Sec. 5, Citizenship Act of March 2, 1907, 34 Stat. 1229.

[14] Toyota *v.* United States (1925), 268 U. S. 402, held: that a person of the Japanese race, born in Japan, who served honorably substantially all the time from November, 1913, to May, 1923, in the U. S. Coast Guard Service—a part of the United States naval force nearly all the time this country was engaged in the World War—may not legally be naturalized under subdiv. 7, Sec. 4, Act of 1906, *supra*, as amended by Sec. 1, Act of May 9, 1918, 40 Stat. 542, as the words "any alien" therein are limited by Sec. 2169, *supra*, to aliens of the color and race therein specified; nor may such person be legally naturalized under Act of July 19, 1919, 41 Stat. 163, 222, as the words "any person of foreign birth" therein are not more comprehensive than the words "any alien" in the Act of 1918, *supra*. *Obiter:* Filipinos, not being "free white persons" or "of African nativity," were not eligible to naturalization prior to the Act of 1918, *supra*, and under that Act are eligible only if they have declared their intention to become citizens and served not less than three years in the United States Navy, Marine Corps, or Naval Auxiliary Service, and have received honorable discharges, or ordinary discharges with recommendation for reënlistment.

[15] Tutun *v.* United States, and Neuberger *v.* United States, *supra*, pp. 574–575, and footnote. Jurisdiction was assumed in the appellate court of the District of Columbia: United States *v.* Daly (1909), 32 App. D. C. 525.

[16] *In re* Fordiani (1923), 98 Conn. 435; 120 Atl. 338; United States *v.* Hrasky (1909), 240 Ill. 560; 88 N. E. 1031; United States *v.* Gerstein (1918), 284 Ill. 174; 119 N. E. 922; *Ex parte* Smith, an Alien (1847), 8 Blackf. (Ind.) 395; *In re* Dean (1891), 83 Me. 489; 22 Atl. 385; State *ex rel.* United States *v.* District Court of 17th Dist. *et al.* (1909), 107 Minn. 444; 120 N. W. 898; *Ex parte* Johnson (1902), 79 Miss. 637; 31 So. 208; State *ex rel.* Rushworth *v.* Judges of Inferior Court of Common Pleas of Hudson County (1895), 58 N. J. Law, 97; 32 Atl. 743 [application for mandamus to compel judges to naturalize relator]; United States *v.* Breen (1909), 135 App. Div. (N. Y.) 824; 120 N. Y. Supp. 304; *In the Matter of the Application of* Abraham S. Karasick (1924), 208 App. Div. (N. Y.) 844; 204 N. Y. Supp. 919; *In*

and Neuberger cases that such jurisdiction exists, and that an appeal is the proper method of securing it, thus settling a long disputed matter.[18]

The question before the Supreme Court hinged upon whether a petition for naturalization was a "case" within the meaning of the Circuit Court of Appeals Act of 1891,[19] conferring jurisdiction upon those courts to review the "final decision in the District Court . . . in all cases," except those directly reviewed by the Supreme Court. The provision was re-enacted in The Judicial Code effective January 1, 1912,[20] and in the amendatory Act of 1925.[21] A denial of review in naturalization cases would ingraft an exception upon an otherwise universal rule.

As to the *finality* of the order granting or denying a petition for naturalization, the Supreme Court said [22] that it was clearly a *final* decision within the meaning of the above statute, even though the certificate of naturalization, if granted, may be canceled under the Act of 1906,[23] for illegality or fraud, and a denial of the petition may not preclude the filing of another application for naturalization on the part of the alien.

The court referred to the source of the judicial authority. Under the Act of 1906,[24] "jurisdiction to naturalize aliens as citizens of the United States," upon their petitions, is specifically conferred upon the Federal District Courts, as well as upon certain State courts. The District Courts have exercised this power since 1795,[25] without its constitutionality ever having been questioned. If a naturalization proceeding were not a "case" or a "controversy" within the meaning of Article 3, Section 2, of the Constitution, this delegation of power upon the courts would have been invalid.

It was held that a "case" arises within the meaning of the Constitution whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure and that remedy is pursued, whether the subject of the litigation be property or status. The Supreme Court decided, for the reasons which follow, that a petition for naturalization is

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re Naturalization of Vura (1913), 5 Ohio App. 334; *Ex parte* Granstein (1833), 1 Hill. (S. C.) Law Rep. 141.

[17] *In re* Wilkie (1922), 58 Cal. App. 22; 208 Pac. 144; State *ex rel.* Weisz *v.* District Court of 16th Judicial Dist. for Garfield County *et al.* (1921), 61 Mont. 427; 202 Pac. 387 [held: that as there was no right of appeal, and no other plain, speedy, and adequate remedy, certiorari would lie to modify order of denial where lower court had exceeded jurisdiction]; State *ex rel.* Gorelick *v.* Superior Court of King County (1913), 75 Wash. 239; 134 Pac. 916.

[18] 169,236 petitions for naturalization were denied by Federal and State courts during the ten fiscal years ended June 30, from 1916 to 1925, inc., being from 9% to 15% of annual total.

[19] Sec. 6, Act of March 3, 1891; 26 Stat. 826, 828.

[20] Sec. 128, Act of March 3, 1911; 36 Stat. 1087, 1133.

[21] Sec. 128 (a), Act of February 13, 1925; 43 Stat. 936.

[22] Tutun *v.* United States, and Neuberger *v.* United States, *supra*, pp. 575–576.

[23] Sec. 15, Act of 1906, *supra*, p. 601.

[24] Sec. 3, Act of 1906, *supra*, p. 596.

[25] Subdiv. 1, Sec. 1, Act of January 29, 1795; 1 Stat. 414.

clearly a proceeding of that character. The petitioner's claim is one arising under the Constitution and laws of the United States, and is presented to the court in such form that the judicial power is capable of acting upon it. The proceeding is instituted and conducted throughout according to the regular course of judicial procedure, with the United States, to whom the full rights of a litigant are expressly reserved,[26] always a possible adverse party. Its contentions are submitted to the court for adjudication. Every final hearing must be held in open court,[27] and every final order made under the hand of the court and entered in full upon the record. The judgment entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside, and may not be collaterally attacked. A certificate procured when the prescribed qualifications have no existence in fact, may be canceled by suit, being in this respect closely analogous to a public grant of land or the exclusive right to a new and useful invention.

The opportunity to become a citizen of the United States is said to be merely a privilege and not a right, and the Constitution does not confer upon aliens "the right to naturalization." But it does authorize Congress to establish a uniform rule therefor,[28] and the opportunity having been conferred by the Naturalization Act, "there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate."[29] The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent, and he must establish these allegations by competent evidence to the satisfaction of the court.[30]

[26] Sec. 11, Act of 1906, *supra*, p. 599.

[27] Sec. 9, Act of 1906, *supra*. When this decision was rendered, Sec. 9 required that at the final hearing "the applicant and the witnesses shall be examined under oath before the court and in the presence of the court." Since then, by the Act of June 8, 1926, 44 Stat. 709–710, the judge of any United States District Court, or the senior judge, if there be more than one, is authorized in his discretion to designate an examiner or officer of the Bureau of Naturalization, including the Naturalization Service, to conduct preliminary hearings upon petitions for naturalization, and to make findings and recommendations thereon to the court. For such purposes, the designated examiner or officer is authorized to administer oaths, subpoena witnesses, and take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization. Where such preliminary hearing has been held, the requirement that the petitioner and his witnesses be examined under oath before the court and in the presence of the court does not apply, except that the court may, and, on demand of the petitioner must, require such examination. Otherwise, the witnesses are excused from attendance upon the final hearing in the favorable cases, and the petitioner does not testify thereat, but merely appears and takes the oaths of renunciation and allegiance.

[28] Art. 1, Sec. 8, cl. 4, U. S. Constitution.

[29] Tutun *v.* United States, and Neuberger *v.* United States, *supra*, p. 578.

[30] "No alien has the slightest right to naturalization unless all statutory requirements are

In passing upon the application the court exercises judicial judgment; it does not confer or withhold a favor.[31]

The government argued that Congress manifested the intention to deny the usual method of appellate review by providing in Section 15, *supra*, for a bill in equity to cancel certificates of citizenship procured fraudulently or illegally. The court's answer was that the remedy afforded to the government by cancelation is narrower than the review commonly afforded by appellate courts, and, further, there is no corresponding provision which would afford to the applicant for citizenship an independent remedy for correcting errors committed in the District Court.

Finally, the court said that since the adoption of the Constitution, Congress has by its legislation sought to promote the naturalization of qualified resident aliens. Though the Act of 1906 did not introduce any change in policy, it did change in some respects the qualifications, and to carry out the established policy through more effective application of the law, it made changes in administrative and judicial machinery. That end is subserved by the correction of the errors of the trial court through appellate review, and neither the Supreme Court's ruling in United States *v.* Ness, *supra*, nor the history of the legislation upon the subject, leads to a denial of appellate review. In the Ness Case, states the court, attention had been called to the fact that Congress had not provided in the Act of 1906 for an appeal from judgments of *State* courts admitting aliens to citizenship. The question then under discussion was whether a judgment of naturalization entered by a *State* court barred as *res judicata* an equity proceeding in a *Federal* District Court under Section 15, *supra*, to cancel the certificate of naturalization.

Aside from the main question of procedure, the merits of both the Tutun and the Neuberger case require notice.

Tutun, a native of Russia, had arrived in the United States in 1904, when nine years old. His petition for naturalization came on for hearing before Judge Lowell, of the District Court of the United States for Massachusetts. During the World War, in his questionnaire submitted in September, 1918, under the Selective Service Act, the applicant had claimed exemption from military service on account of alienage. He offered evidence of two witnesses to show his residence and moral character, and that he was "attached to the principles of the Constitution" and was well disposed to the good order and happiness of the United States. These facts are required by the Act of

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complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it as provided in Section 15 [*supra*] and demand its cancelation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence non-essential." United States *v.* Ginsberg, *supra*, p. 475.

[31] Tutun *v.* United States, and Neuberger *v.* United States, *supra*, p. 578.

1906 to be proved "to the satisfaction of the court." [32] The court, however, refused to hear any evidence in regard to such attachment. It held that the claim of exemption from military service was *conclusive proof* that he was *not* so attached and not well disposed, and, in 1924, denied his petition on that ground.

The question whether an appeal could be entertained by the Circuit Court of Appeals for the First Circuit having been decided by the Supreme Court in the affirmative,[33] the Circuit Court of Appeals (by Circuit Judges Bingham, Johnson, and Anderson) reversed the lower court. It expressed the opinion that the denial of citizenship on the sole ground stated was unwarranted by law, as the court had no power, through the exercise of an arbitrary discretion, to add to the legal requirements laid down by Congress.[34] Referring to the fact that the Selective Service Act, as at first enacted,[35] provided for the drafting of *declarant* aliens into the military service of the United States, the court added that Congress, in an act approved July 9, 1918,[36] said that a *declarant* alien, who was a citizen or subject of a *neutral* country during the war, should be relieved from liability to military service upon making a declaration withdrawing his intention to become a citizen, which should cancel his declaration and forever bar him from becoming a citizen. Tutun was *not a neutral alien* but a subject of Russia, and when he claimed military exemption he *had not yet made his declaration of intention* and did not do so until September 4, 1919. So he was clearly not embraced within the class proscribed by the Act of 1918. The court stated that while several bills were introduced in Congress to similarly penalize *non*-declarant aliens, they failed to pass, Congress thus refusing to raise against them the bar to citizenship it had raised in regard to declarant aliens. The only reasonable inference the court was able to draw was that Congress did not intend to proscribe the former class.

The First Circuit thus followed the action of the Circuit Court of Appeals

[32] Subdiv. 4, Sec. 4, Act of 1906, *supra*, p. 598.

[33] Tutun *v.* United States, and Neuberger *v.* United States, *supra*.

[34] Tutun *v.* United States (May 29, 1926), 12 F. (2d) 763–765 (Advance Sheets).

[35] Sec. 2, Act of May 18, 1917; 40 Stat. 76, 77–78, provided that: "Such draft . . . shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens . . ."

[36] Ch. XII, Sec. 4; 40 Stat. 845, 885: "*Provided*, That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States." This provision was duplicated in Sec. 1, Act of August 31, 1918; 40 Stat. 955.

For the procedure under the quoted provision, see Selective Service Regulations, 2nd ed., September 16, 1918, Washington, Government Printing Office (1918), Sec. 79, Rule XII (l), p. 55; Sec. 117½, pp. 80–82; and Secs. 325–326, pp. 279–280.

for the Ninth Circuit, in a proceeding by the United States to cancel the certificate of naturalization of one Siem as having been illegally issued to him in 1922, because of his attitude in relation to the draft. A native and subject of Norway, Siem had declared his intention to become a citizen in 1914. Thereafter he registered in the draft of 1917, under the Selective Service Law of that year, and claimed exemption on the grounds of (1) dependents, (2) alienage, and (3) physical unfitness. However, he was classified in A-1 (single man without dependent relatives). He was called, examined, and then rejected as physically unfit. The mere fact that he had claimed exemption from United States military service during the World War because of alienage was held not sufficient in itself, *as a matter of law*, to debar him. The court found no ground for holding that the claim of exemption "absolutely proves that the applicant's declaration of intention to become a citizen is made *mala fide*, or that he is not well disposed to the good order and happiness of the United States, or not attached to the principles of the Constitution." [37] Circuit Judge Ross, concurring, referred to the provision forever debarring certain neutral aliens from citizenship, and said: [38] "If Congress intended that the same result should follow from the mere claim of an exemption given by law, it would have so declared."

The Tutun case was remanded to the lower court for further action not inconsistent with the Circuit Court's opinion, and he was later granted naturalization. There seems to be no reason, however, why District Courts in the First and Ninth Circuits may not hear the evidence in any case involving a claim of military exemption and then decide as matter of *fact*, if such be the case, that it does not appear "to the satisfaction of the court" from such evidence that the applicant is attached to the Constitution, and deny his petition for naturalization on that ground.[39]

[37] United States *v.* Siem (1924), 299 Fed. 582, 583–584.

[38] *Ibid.*, p. 584.

[39] The Circuit Court decisions in the Tutun and Siem cases, *supra*, are of course, binding only upon the Federal District Courts of the First and Ninth Circuits, respectively. There has been great variance in the decisions of the Federal District Courts as to the effect upon the applicant's eligibility for naturalization of his claim for exemption from United States military service in his questionnaire under the Selective Service Act, during the World War. The reported cases, so far as the information is available as to those courts, may be roughly classified as to nationality and status in chronological order as follows:

Denial of petition for naturalization by State court is *res judicata*, so as to prevent filing of subsequent petition in Federal court. *In re* Norman (Mont., 1919), 256 Fed. 543.

Declaration of intention repudiated by surrender to Norwegian consul, but not acted on before Armistice; applicant inducted into service; petition denied with prejudice for unstated probationary period to establish attachment to Constitution. *In re* Loen (Wash., 1919), 262 Fed. 166.

Austro-Hungarian declarant [a "declarant" being a person who, at the time of claimed exemption from military service, *had made* the formal declaration of his intention to become a citizen of the United States required of most aliens before filing the petition for naturali-

The Neuberger case is more far-reaching, as appears from the opinions on the merits of the District Court and the Circuit Court of Appeals, below. Born a German subject in Bavaria in 1873, Neuberger came to the United States in 1903, while a reserve captain of German artillery. He married an American in 1903, had two children born here, and resided and was continuously engaged in business here until 1914, although it is alleged that he drilled in the German Army in 1909. There is a question whether he resigned from the German Army in 1912, was discharged in 1913, or was retired.

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zation]; petition denied with prejudice, not attached to Constitution, and declaration not made in good faith. *In re* Silberschutz (Mo., 1920), 269 Fed. 398.

Italian declarant; petition denied with prejudice and declaration canceled. *In re* Tomarchio (Mo., 1920), 269 Fed. 400.

Swiss declarant claimed benefit, prior to July 9, 1918, of Art. 2, treaty concluded with Switzerland Nov. 25, 1850 [11 Stat. 587, 589]; petition denied as declaration abandoned. *In re* Trachsel (Ohio, 1921), 271 Fed. 779.

Alien enemy declarant; declaration not voided. *In re* Miegel (Mich., 1921), 272 Fed. 688.

Russian declarant; petition denied, not attached to Constitution. *In re* Rubin (Mich., 1921), 272 Fed. 697.

Sworn statement at hearing on petition for naturalization that had not made claim of exemption on account of alienage, held material on prosecution of Norwegian declarant for perjury. Hauge *v.* United States (C. C. A., 9th Cir., 1921), 276 Fed. 111.

Friendly non-declarants ["non-declarants" being persons who, at the time of claimed exemption from military service, *had not made* the formal declaration of their intention to become citizens]; petitions for naturalization, based upon declarations of intention made after the claim of exemption, granted, as under no legal duty to render military service. *In re* Levy and five other cases (Texas, 1922), 278 Fed. 621.

Russian non-declarant; petition denied, not attached to Constitution. *In re* Shanin (Mass., 1922), 278 Fed. 739.

Swiss non-declarant; petition denied as intention to become a citizen did not begin until became a declarant. *Petition of* Escher (Texas, 1922), 279 Fed. 792.

Norwegian declarant; petition granted. *In re* Siem (Mont., 1922), 284 Fed. 868; affirmed in United States *v.* Siem (C. C. A., 9th Cir., 1924), *supra*. In the former opinion Judge Bourquin discusses the political status of persons, and the obligations of citizens and aliens under municipal and international law.

Italian, German, and Swiss declarants; petitions denied and declarations invalid if latter made prior to claim; without prejudice to refiling petitions approximately five years after questionnaire filed, on valid declarations; alien enemy status not material. *In re* Pitto; *In re* Kirby; *In re* Teuscher (Ore., 1923), 293 Fed. 200.

Enemy and friendly declarants and non-declarants; petitions denied for want of loyalty, with leave to file new petitions only after five years from declaration of intention made subsequent to Armistice. *In re* Linder (Calif., 1923), 292 Fed. 1001. Followed by a considerable number of courts. Linder was an enemy nondeclarant (German). See *In re* Gustavson (Calif., 1924), 300 Fed. 251.

Non-enemy aliens; petitions denied as not attached to Constitution during continuance of World War and until its official termination, July 2, 1921, by Joint Resolution of that date, 42 Stat. 105–107; with leave to file new petitions five years after that date, on declarations made subsequent to July 2, 1921. *In re* Bevelacqua; *In re* Gitelman; *In re* Tsaler (Mass., 1924), 295 Fed. 862. Followed by a number of courts.

Enemy declarants and non-declarants, and non-enemy declarants and non-declarants;

In June, 1914, he went abroad intending to return within two or three months. His apartment was under lease for two years, his motor unsold, and his chauffeur under wages. His brother having died, in mid-July he and his family went to Germany to help the brother's family. At the outbreak of the World War he was in Nuremberg visiting a sister. He was detained there, apparently unwillingly as a German, and compelled to serve, without alternative but to expose himself to the penalties of German military law. In October, 1914, he was placed in a non-combatant position as an officer in the military post office in Nuremberg, and was not discharged until December 28, 1918. He finally sailed from Rotterdam on May 17, 1921, and reached New York on May 27, 1921. The delay between his discharge in 1918, and his departure for the United States in 1921, he stated was due to lack of means, inability sooner to get any passport or permission to return in spite of repeated efforts, the general conditions in Europe which made it impossible for a German to enter any other country except on official business, and a short illness of one of his children. On his arrival here he at once took up his business and began living in his old apartment.

He petitioned for naturalization to the District Court of the United States for the Southern District of New York on April 28, 1924, and had therefore been in the United States but about two years and eleven months during the five years immediately preceding his application.[40]

District Judge Bondy called attention to the fact that petitioner knew that, if in Germany, he could be compelled to serve in the German Army against any country with which Germany might be at war. Further, that he *did* serve as an officer in an army carrying on war against the United States, however distasteful such service may have been to him. Germany was technically an enemy country until war was declared terminated on July 2, 1921.[41] To naturalize an alien actually in the United States only two years and eleven months in the five years next preceding his application for admission, and who, since he left the United States in 1914, served four

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claim insufficient to warrant denial of petitions. *In re Naturalization of Aliens* Who Claimed Exemption from the Draft or from Military Service (Wis., 1924), 1 F. (2d) 594. Judge Geiger presents a comprehensive review of the status of aliens under the Selective Service Law, including a statement of the attitude of foreign governments in the premises.

It should be understood that the law does not preclude the naturalization of alien enemies as such. The former prohibition in that respect was Sec. 2171, Revised Statutes (1878), which provided: "No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; . . . " It was repealed and superseded by the wartime naturalization legislation of 1918, found in subdiv. 11, Sec. 4, Act of June 29, 1906 (34 Stat. 596), as amended by Sec. 1, Act of May 9, 1918 (40 Stat. 542, 545), which permits their naturalization under certain rigid restrictions, with the right of the Bureau of Naturalization reserved to demand a continuance of the hearing as long as it may require.

[40] *In re* Neuberger (April 16, 1925), 6 F. (2d) 387 [opinion of District Court].

[41] Joint Res. of July 2, 1921, *supra*.

years as an officer in an army which during a part of the time carried on war against the United States, would, in the court's opinion, violate the law prohibiting the admission to citizenship of an alien who had not, for the continued term of five years just preceding his admission, resided within the United States.[42] This result would follow, "irrespective of what may have caused his absence, irrespective of what may have been his intention to return, and irrespective of the length of time he resided in the United States before the five years next preceding admission." [43] The petition was denied.

Neuberger appealed, raising the question of his right to a judicial review of the order of denial.[44] The Circuit Court of Appeals for the Second Circuit (Circuit Judges Hough, Hand, and Mack),[45] considering the merits, were agreed as to the law, as stated by Judge Hand, though Judge Hough dissented from the result. That Neuberger's domicile remained in New York the court had not the slightest doubt. His detention in Germany until December, 1918, at least, was *involuntary*. The court stated that residence is another thing from domicile, though just what it is, is not altogether plain, that it had previously held [46] that an alien who had *voluntarily* absented himself from this country for over two years and two months of the required five, to visit his mother who was ill, had lost his residence here, though his domicile remained, and that it had no question of the correctness of the former decision, or the language in it which involves the conclusion that a man may have continuous residence if he is away for one year, but not if he is away for two. But the court disclaims any intention of having held that there is a period of absence which of itself and without more will break the continuity of the alien's residence.

Absence or absences may be, and, *when voluntary*, generally are, said the court, a controlling test, but only as evidence of the state of mind towards the place of supposed residence. "Of themselves they are immaterial, once the

[42] Sec. 2170, Revised Statutes (1878), provides: "No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States." Subdiv. 4, Sec. 4, Act of 1906, *supra*, p. 598, provides: "It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, . . ."

[43] *In re* Neuberger, *supra*, p. 387.

[44] Neuberger *v.* United States (Nov. 24, 1925), 9 F. (2) 1020 [certification by Circuit Court of Appeals to Supreme Court of questions concerning right of review].

[45] Neuberger *v.* United States (July 13, 1926), 13 F. (2d) 541 (Advance Sheets) [decision of Circuit Court of Appeals on the merits].

[46] United States *v.* Mulvey (1916), 232 Fed. 513, 516.

residence is established; in this, residence is like domicile." But the court does not attempt to define the necessary attitude of mind to create or retain a residence under the naturalization statute, or to explain how it differs from the choice of a "home," the test of domicile. "Frankly it is doubtful whether courts have as yet come to any agreement on the question. But there is substantial unanimity that, however construed in a statute, residence involves some choice, again like domicile, and that presence elsewhere through constraint has no effect upon it."

It was therefore held by the Circuit Court of Appeals, that if Neuberger's story be true, his residence, once established, was not lost by his enforced absence in Germany. The following significant statement was added:

> It is true that we must face the consequence that it [residence] would not have been lost, if he had been absent for the whole preceding five years. We are quite aware that the result might be altogether to prevent that direct observation of him by his witnesses which the statute contemplates, and to deprive him of those contacts through which he is supposed to become assimilable to our national group. But Congress has very deliberately chosen residence as the test, repealing in 1848 . . .[47] the Act of 1813 . . . ,[48] which required continuous presence.

The Circuit Court agreed that the facts justify close scrutiny, not only as to the *bona fides* of Neuberger's excuse, but as to his compliance with the other requirements. The case was remanded to the District Court for further proceedings as the record did not show that the applicant had satisfied that court on either score.

In his dissenting opinion,[49] Circuit Judge Hough, while agreeing as *matter of law*, declared that as *matter of fact*, Neuberger had failed to bear the burden of proof on a vital point not mentioned in the prevailing opinion, his behavior as a man "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Reviewing Neuberger's acts, the judge stated that the retention of his German captaincy, and the use of American business for upwards of ten years while maintaining German nationality [he had not declared his intention to become a citizen until after his return in 1921], marked him as one of a class who before the World War preferred the nationality which gave his rank consideration of a kind unknown in a democracy. Said the judge:

> He does not satisfy me; he has not, I think, borne the burden of proving a change of heart, for no man could be at the same time a

[47] Act of June 26, 1848; 9 Stat. 240.

[48] Sec. 12, Act of March 3, 1813; 2 Stat. 809, 811, provided: "That no person . . . shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission as aforesaid have resided within the United States, without being at any time during the said five years, out of the territory of the United States."

[49] Neuberger *v.* United States, 13 F. (2d) 543–544 [decision of Circuit Court of Appeals on the merits].

> qualified German officer and attached to such a form of words as the Constitution of this country. I know well how cheap we have made the privilege of American citizenship, but do not believe the statute requires quite this degree of cheapness; so I dissent.

The United States petitioned the Supreme Court for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit, to review the question whether, under the circumstances of Neuberger's absence, he could be held to have *legally* "resided within the United States" during the required five *continuous* years. *Certiorari* was granted.[50] As that proceeding is yet to be heard, its merits cannot be discussed at this time.

Applications for naturalization are filed at the rate of more than 150,000 annually. In many of them the question of admissibility depends upon whether an absence of the alien from the United States during the period of required residence here has interrupted its continuity. Because a definite and authoritative rule upon the point would not only aid the administrative branch of the government in its supervision of naturalization matters, but would be of inestimable benefit to applicants for citizenship and the courts, the Supreme Court's determination will be awaited with great interest.

[50] The United States of America, petitioner, *v.* Moritz Neuberger, No. 697, docketed October 18, 1926, in Supreme Court of the United States; *certiorari* granted, November 29, 1926.

THE NATURE OF AMERICAN FOREIGN POLICY

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In the present study the phrase "foreign policy" will be used to refer to the purposes or objectives and the corresponding program of action held in view by one nation in carrying on its relations with other nations. More especially it is intended to refer beyond the surface current of events which constitute the foreign affairs or diplomatic relations of a nation in an objective sense, and which are frequently confused with the rules or tenets of policy followed by the nation in conducting its foreign affairs, and to indicate solely the principles guiding the nation in this activity. Without interpretation in terms of principle, a record of the discontinuous incidents in the foreign affairs of a nation is as meaningless as a list of the names of the kings of England.

By "American" foreign policy is meant that body of policies which have been consistently and vigorously acted upon by the United States through those officially charged with conduct of its foreign affairs. This might include policies never explicitly formulated or proclaimed but actually followed by the United States in her international relations. It would exclude, on the other hand, policies verbally proclaimed but consistently violated in practice, the decisions made in the actual practice of international relations being regarded as more reliable as indications of the real convictions of the nation than the phrases of the presidential message. It would not, however, exclude policies proclaimed but never acted upon, or acted upon inadequately, perhaps ineffectively urged upon an unwilling world, although these policies would have to be regarded as less important in any picture of national policy than other items which had been given effective support. Finally it would not exclude items of policy merely because at one time or another they had been temporarily violated or violated under stress of circumstances out of line with the normal condition of affairs. Items of policy held for decades and only recently abandoned or revised should receive special treatment in view of these developments.

The object of the study in general is to set forth the fundamental "nature" of the foreign policy of the United States, considered as a whole. But in order to accomplish that end it is proposed, first, to make a statement of the detailed items in the historic national foreign policy; then to compare this body of policies with the policies of leading European nations; next to inquire into the causes for the adoption of these different policies by the United States and the European nations; and finally, most important of all, although the exact significance of the inquiry may not be apparent until later, to

inquire into the reception accorded to the principles of American policy by other nations and the significance of that reception.

ITEMS IN THE FOREIGN POLICY OF THE UNITED STATES

The United States began its career in international affairs in 1774, with the meeting of the United Colonies in the First Continental Congress. From that day to this a set of national policies have been worked out for application in relations with other nations which might be grouped under four general headings as follows: (1) Policies calculated to remove certain historic obstacles to free individual and national life in the world. (2) Policies calculated to remove certain obstacles to fuller international economic and cultural intercourse. (3) Policies calculated to remove obstacles to cordial international political relations. (4) Policies in the promotion of organized international government. To each of these we will now turn.

1. *Policies for freer individual and national life.* Certain American policies are calculated to promote a freer life in this world, both for individual human beings and for those aggregations of human beings which we call nations.

Thus, the United States has held strong convictions on the subject of Nationality.[1] We vigorously maintained that every individual had a natural right to sever, on his own motion, the ties which bound him to his mother country and leave that country at will, or that he should be granted that privilege by every enlightened nation.[2] This attitude on the question of expatriation we rendered more realistic by the policy of encouraging emigration from other countries, or at least immigration to our own shores.[3] Finally we asserted the right of any nation to naturalize as citizens in full standing such aliens and expatriates as it chose without permission from the mother country.[4]

[1] To be rigorously scientific, each item in the survey which follows should be documented for the whole course of American foreign policy, and for American actions as well as American utterances. Such a method of treatment is out of the question here. Instead, for each item there will be given a citation to a sample of the utterances or actions of the United States in support thereof, such samples being regarded as representative of the general attitude of the United States on the points involved.

[2] Right of expatriation: Act of July 27, 1868, in 15 U. S. Stat. at Large, 223. This view was, apparently, not adopted until somewhat late in the formative period of American policy. Hyde, C. C., International Law, §378.

[3] Encouragement of immigration: "Heretofore we have welcomed all who came to us from other lands except those whose moral or physical condition or history threatened danger to our national welfare or safety." President Cleveland, message to House of Representatives, returning without approval the Immigration Bill of 1897, providing a literacy test for admission of aliens, in U. S. Congressional Documents, Sen. Doc. 185, 54th Cong., 2nd Sess., 1. The general attitude of the United States has not prevented us from opposing Oriental immigration from the beginning, artificially stimulated immigration, and —of late years—immigration at a rate too great to permit of assimilation into the national life, thus defeating the underlying purpose of the whole policy; see, below, at note 84.

[4] Power to naturalize aliens to full citizenship: Act of July 27, 1868, as cited above, note 2.

Of equal standing is the American policy regarding Recognition. Our policy has been to recognize new governments and states whenever they arise upon a basis of popular support irrespective of legitimist constitutional restrictions protecting monarchical power and privilege.[5] We have carried this policy still further by refusal to recognize personal military revolts against constitutional governments based on popular suffrage,[6] and by action to prevent the leaders of such revolts from obtaining arms and munitions in this country.[7] We have even, in later days, intervened by armed force in support of the established republican government.[8]

All of these policies make for greater individual and national liberty.

2. *Policies for freer international intercourse.* Certain American policies are such as to promote general international trade, travel, and communication.

The largest single group of policies held by the United States is that which may be referred to by the general title of The Freedom of the Seas. These policies should, however, be considered in connection with the widely divergent conditions obtaining in times of peace or war, respectively.

In time of peace we have demanded the right to use the high seas free from interference (visit and search) by the public vessels of any Power,[9] and we have sought the abolition of piracy[10] and the maritime slave trade.[11] We have insisted upon restricting the marginal belt of coastal waters, over

[5] Recognition of popular revolutionary states and governments: Jefferson to Morris, Nov. 7, 1792, in Jefferson, T., Writings, Washington ed., III, 488. The early recognition policy is said to have been a policy of pure *de factoism* and the policy of popular legitimism to have been of more recent growth. Hyde, §44. But with circumstances what they were in the world in the period 1789–1825, *de factoism* necessarily meant encouragement of republican revolution. Moreover, it was common to state the *de facto* policy in a form which was actually equivalent to a policy of popular legitimism; thus: "In its intercourse with foreign nations the Government of the United States has, from its origin, always recognized *de facto* governments. We recognize the right of all nations to create and reform their political institutions according to their own will and pleasure." Buchanan to Rush, March 31, 1848, in Sen. Ex. Doc. 53, 30th Cong., 1st Sess., 3.

[6] Refusal to recognize military dictators: President Wilson's refusal to recognize Huerta in Mexico in 1913 in message to Congress, Dec. 2, 1913, in House Doc. 339, 63d Cong., 2d Sess. We encouraged the Central American States to take the same position in a treaty signed at the Central American Conference in Washington, 1922–1923. See Conference on Central American affairs, Washington, 288 (Art. II of Treaty of Peace and Amity). This attitude has been taken only in more recent years as we have developed a more courageous attitude in matters of this sort and thrown off the lingering error that we were committed to a policy of pure *de factoism*. Hyde, §44, as already cited.

[7] Embargo on arms: Joint Resolution of March 14, 1912, in 37 Stat. at Large, 630.

[8] Armed support of republican governments: Foreign Relations of the United States, 1912, 1037–1044 (Nicaragua).

[9] Opposition to visit and search in time of peace: Marcy to Cueto, March 28, 1855, in Sen. Ex. Doc. 1, 35th Cong., Spl. Sess.

[10] Abolition of piracy: Act of April 30, 1790, I Stat. at Large, 113.

[11] Abolition of slave trade: Treaty of July 2, 1890 (General Act of Brussels), in Treaties Between the United States and Other Powers, ed. by Malloy, Charles, etc., II, 1964.

which territorial jurisdiction may be exercised, to the narrowest practicable limit[12] and restricting the degree of authority exercisable by the riparian state over its territorial waters.[13] We have opposed the attempt to treat as territorial great open bays and gulfs.[14] We have urged the opening of interoceanic sounds or straits,[15] and canals,[16] to international use, and have applied the same doctrine to international rivers.[17] Finally we have campaigned against discriminatory port and harbor dues and against local pilotage regulations of like character.[18]

In regard to maritime law in time of war we have urged a restriction of belligerent rights in all directions. We have demanded that the power of blockade be restricted so as to eliminate mere paper blockades,[19] forbid the application of blockade to neutral ports,[20] and restrict capture to the immediate neighborhood of the blockade operations.[21] We have sought to have belligerent rights under the law of contraband restrained by an international definition of contraband to replace national belligerent definitions,[22] by a reduction of the list of commodities to be treated as contraband either absolutely or under varying conditions,[23] and by recognition of a large free-list of goods never to be so treated.[24] We have urged a restriction on the

[12] Restricting width of marginal belt: Fish to Thornton, Jan. 22, 1875. Foreign Relations, 1875, I, 649.

[13] Restricting authority of riparian state. Bayard to Manning, May 28, 1886, in Moore, J.B., Digest of International Law, I, 718.

[14] Opposition to inclosure of gulfs and bays: Argument of counsel for United States in North Atlantic coast fisheries arbitration in Sen. Doc. 870, 61st Cong., 3d Sess., XI, 2139. The mistaken position taken for a time by the United States in regard to Bering Sea (Hyde, I, 260, n.2) does not alter our general attitude, any more than does the treatment by us of the Delaware and Chesapeake Bays as territorial with the general consent of the nations (Hyde, §146).

[15] Opening of interoceanic straits: President Wilson, message to Congress, Jan. 8, 1918, in House Doc. 765, 65th Cong., 2d Sess., 6.

[16] Canals to be open: Treaty with Great Britain of Nov. 18, 1901, in I Treaties, 782.

[17] Rivers: Jefferson to Carmichael and Short, March 18, 1792, in U. S. Congress, 1789–1828, American State Papers, Foreign Relations, I, 252.

[18] Port discriminations opposed: Act of March 1, 1823, in 3 Stat. at Large, 740; treaty with Spain of July 3, 1902, in II Treaties, 1703.

[19] No paper blockades: Lansing to Page, Oct. 21, 1915, in U. S. Dep. of State, European War (*"American White Books"*), III, 25.

[20] No blockade of neutral ports: U. S. Secretary of the Navy, Instructions Governing Maritime Warfare, June 30, 1917, Art. XXVI.

[21] Capture only in area of operations: Declaration of London, Art. XVII, in U. S. Naval War College, International Law Topics, 1909, 49. We do not seem to have been compelled to consider this question until Civil War times. We were then led to imitate the extreme British theory of liability to capture off port of departure. More recently we have finally adopted what seems to be the sound doctrine. See Hyde, §§835, 836.

[22] International definition of contraband: Cass to Mason, June 27, 1859, quoted in Moore, Digest, VII, 657.

[23] Reduction of contraband lists: Same, 660.

[24] Free-list favored: Report of American Delegates at the International Naval Conference, London, 1909, in Foreign Relations, 1909, 307.

use of automatic contact mines,[25] on the destruction of prospective or actual prizes,[26] on the establishment of war zones,[27] and upon the rights of capture and condemnation for unneutral service.[28] We have demanded for neutrals the right to make use of armed convoy for commercial vessels,[29] and the right to arm their merchant vessels themselves for defensive purposes.[30] We have sought immunity for postal, scientific, and philanthropic vessels, personnel, and material in time of war,[31] and have even put forward the demand for complete immunity of private property, enemy as well as neutral, from capture at sea in time of war, with the exception of contraband of war.[32]

Finally, the United States has taken certain steps to facilitate even more directly international commerce and communications. We have led in the admission and equable treatment of alien merchants.[33] We have always sought the insertion of the "most favored nation" clause in commercial treaties and have recently decided to give this clause universal and unconditional application in the future.[34] We have urged the policy of the open door or equal opportunity for trade and exploitation in undeveloped territories in Asia and Africa.[35] We have demanded freedom and equality of opportunity for telegraphic communication, especially by cable and wireless.[36]

All of these policies aim at the expansion of world intercourse.

3. *Policies for more cordial international political relations.* Certain American policies attack the obstacles to international cordiality in the political sphere.

[25] Opposition to use of mines: Memorandum from United States Government to British Embassy, Aug. 13, 1914, in IV American White Book, 21.

[26] Opposition to destruction of merchant vessels prospective or actual prizes: Bryan to Gerard, Feb. 10, 1915, in same, I, 54.

[27] Opposition to war zones: Lansing to Gerard, April 18, 1916, in same, III, 241.

[28] Restriction of law of unneutral service: U. S. Naval Instructions of 1917, Arts. XXXVI–XXXVIII.

[29] Right of convoy: Treaty with Italy of Feb. 26, 1871, in I Treaties, 975.

[30] Arming neutral merchant vessels: Lansing to Gerard, Nov. 7, 1914, in II American White Book, 45.

[31] Immunity from capture of certain types of property: U. S. Naval Instructions of 1917, Art. LXIII.

[32] Immunity of all private property: Address of American delegate at Second Hague Peace Conference, 1907, in *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 750.

[33] Reception of allied merchants: Treaties with France, Great Britain and other Powers, 1776–1789, especially treaty with Prussia of 1785, in II Treaties, 1477.

[34] Most favored nation treatment: U. S. Tariff Commission, Reciprocity and Commercial Treaties, 1919, 453. The narrow interpretation long given to the most favored nation clause by the United States was naturally regarded as peculiarly inconsistent with her general policies in such matters. See Hyde, §536.

[35] Open door policy: Hay documents in Foreign Relations, 1899, 128–141.

[36] Equality in electrical communications: Fish to Motley, Nov. 23, 1869, quoted in Moore, Digest, II, 476.

Thus the policies of the United States relating to Peace are familiar and well confirmed. We have from earliest times adopted an anti-militarist attitude generally, decrying large standing armies and navies,[37] ourselves condemning conscription, at least in time of peace, relying on militia forces on land[38] and making large use of converted merchant vessels[39] and privateers[40] in war at sea. In later years we have abolished prize money in the navy[41] and attempted to lead the movement for disarmament on land and sea.[42] By way of an anti-imperialist attitude we have not merely decried territorial conquest by other states,[43] but have pursued a peculiarly non-imperialist colonial policy ourselves, acquiring territory which was, in the main, strictly contiguous to territory we already held, empty of civilized inhabitants—thus involving no subjugation of unwilling population—acquiring it usually by purchase or other form of voluntary agreement, and, rather than keep it in a position of perpetual dependence, finally either bringing the new territories which we had occupied under the Constitution on a par with States or Territories already in the Union,[44] or providing independence for them as in Cuba and, presumably, in the Philippines. In addition we have taken every occasion to express our attachment to the ideal of world peace, peace among the nations, in and for itself,[45] and have done all we felt we could do to delay and possibly wholly prevent war in the future between ourselves and any other nation.[46]

[37] Attitude toward large armies and navies: Address of President Harding to Conference on the Limitation of Armament, Washington, 1921–1922, in Sen. Doc. 126, 67th Cong., 2d Sess., 37. Even in recent years, while we have been building a "navy second to none," we have so far remembered the old faith as to inaugurate in the very hour of our triumph a movement to limit naval armaments which must prevent us from attaining a maritime supremacy otherwise certain to be ours.

[38] Reliance on volunteers and militia: See materials in Upton, E., Military Policy of the United States, being Sen. Doc. 379, 64th Cong., 1st Sess. The widespread disposition to regard the Selective Service Act of 1917 as contrary to American traditions and ideals is further evidence to the point.

[39] Use of conversion: Act of March 3, 1891, in 26 Stat. at Large, 830. We have, however, opposed conversion at sea as involving too great perils to neutral shipping; International Naval Conference, Proceedings, in G. B. Parliamentary Papers, Misc. No. 5 (1909), 268.

[40] Use of privateers: Buchanan to Marcy, March 24, 1854, in House Ex. Doc. 103, 33rd Cong., 1st Sess., 10.

[41] Abolition of prize money: Act of March 3, 1899, in 30 Stat. at Large, 1007.

[42] Favored disarmament: Instructions to American delegates to Second Hague Peace Conference, 1907, in Foreign Relations, 1907, II, 1132.

[43] Condemnation of conquest: Blaine to Trescot, Dec. 1, 1881, in Foreign Relations, 1881, 143.

[44] Nature of American territorial expansion and colonial policy: Potter, P. B., "Nature of American Territorial Expansion," in this JOURNAL, Vol. XV, No. 2 (April, 1921), 189.

[45] Peace sentiment of America: Instructions to American delegates to First Hague Peace Conference, 1899, Annex A, in Foreign Relations, 1907, II, 1139.

[46] Bryan peace treaties: See for example the treaty with Great Britain of Sept. 15, 1914, in III Treaties, 2642.

The Neutrality policy of the United States is closely allied to the foregoing. We insist on the right to remain neutral[47] and on the right to have our neutrality respected,[48]—our territory, our territorial waters, and the lives and persons of our citizens,—and this attitude reënforces at one point our policy on the freedom of the seas. We also attempt to turn our neutral position to account for peace by remaining friends with both sides and, as mediators, promoting the reëstablishment of peace at the earliest practicable moment.[49] Far from constituting an isolationist policy, it aims specifically at maintaining a maximum of international cordiality and contact all around.[50]

The policy of No Alliances is of kindred character. The aim is not isolation, but greater general coöperation. We wish no alliances of policy, temporary or permanent, which would make us exclusively the partisans of one or more nations and set us in opposition to the rest, which would embitter our cordial relations with certain Powers and mayhap drag us into war on narrow grounds of some purely national policy, the national policy of some one foreign Power.[51]

In the Monroe Doctrine also we have a policy directly related to the maintenance of general international peace and security. To protect the peace of the Americas, our own safety, and promote general harmony among the nations, we mean to oppose territorial expansion in this hemisphere by non-American Powers at the expense of the Latin-American nations,[52] and for these reasons, and not for any isolationist purpose, we mean further to oppose political intervention by such Powers in the domestic republican institutions of those nations.[53] To further reënforce these policies we are prepared to assume quasi-mandates over backward Latin-American countries by military force, administrative aid or financial supervision.[54]

[47] Right to remain neutral: Attitude of Washington and advisers in 1790; see Washington to Lafayette, Aug. 11, 1790, in Washington, G., Writings, Ford ed., XI, 496; Jefferson, T., Writings, Ford ed., V, 198; Hamilton, A., Works, Lodge ed., IV, 20.

[48] Protection of neutral rights: Attempt to secure observance of Declaration of London by belligerents in 1914–1918, Bryan to Page, Aug. 6, 1914, in I American White Book, 5. See also materials in Problems of Neutrality When the World is at War, by Fess, S. D., being House Doc. 2111, 64th Cong., 2d Sess.

[49] Neutral mediation: Loomis to Meyer, June 8, 1905, in Foreign Relations, 1905, 807.

[50] See Potter, P. B., Myth of American Isolation, 452–454.

[51] No alliances: See materials set out in same, 455–459.

[52] No territorial expansion in the Western Hemisphere by non-American Powers: "The American continents . . . are henceforth not to be considered as subjects for future colonization by any European powers." Message to Congress of President Monroe, Dec. 2, 1823, in American State Papers, Foreign Relations, V, 246.

[53] No intervention in domestic affairs of Latin-American states: "We could not view any interposition (in the Latin American states) for the purpose of oppressing them or controlling in any other manner their destiny . . . in any other light than a manifestation of an unfriendly disposition towards the United States." Same, 250.

[54] Quasi-mandates over Latin-American states: Protocol of Feb. 7, 1905, with Dominican Republic, in message of President Roosevelt to Senate of Feb. 15, 1905, in Foreign Relations,

Such are the American policies for promotion of international political cordiality.

4. *Promotion of organized international government.* Certain American policies make directly for closer and more effective international organization.

The earliest American policies directed toward more effective international government related to Diplomatic Methods. We have always stood for a simplification of the ranks and titles used in diplomacy and abolition of discriminations based on rank.[55] We have stood for a simplification of costume, of ceremonial, of etiquette, and of social usage in diplomacy.[56] We have sympathized with and encouraged recourse to the vernacular languages of the nations concerned in place of the diplomatic French.[57]

In regard to International Law we have also sought fairness and justice. We have urged the elaboration and development of the content of the law itself.[58] We have encouraged the practice of invoking the application of international law in settling any international difficulty in preference to remaining on the lower plane of diplomatic bargaining.[59] Finally we have urged and promoted by our own actions the codification of international law to render recourse to it more feasible and to encourage international judicial settlement.[60]

In the field of International Judicial Settlement itself our policy is well known. We desire to see international disputes submitted to arbitration as frequently as possible.[61] To this end we desire to see arbitration treaties, providing for such submission, signed in as large numbers as possible.[62] We have urged the creation of permanent courts in place of temporary arbitral bodies,[63] the substitution of truly judicial for merely arbitral tribunals,[64] and

1905, 334. The absence of express authorization from other nations lays the United States open to the charge of imperialism here, of course; but this charge seems to be well met by our consistent self-restraint and moderation in all these delicate ventures.

[55] Reduction of importance of rank and precedence in diplomacy: Bayard to Phelps, July 2, 1885, quoted in Wharton, F., Digest of the International Law of the United States, II, 625. That this attitude regarding diplomatic methods was not merely one of obstruction or sabotage is shown by our eager participation in the game while voicing these objections to its rules and customs. Myth, 450.

[56] Reduction of ceremony in diplomacy: "No government can disregard formalities more than ours;" Jefferson to Genet, in Jefferson, Writings, Ford ed., IV, 92.

[57] Use of vernacular: U. S. Dept. of State, Instructions to Diplomatic Officers of the United States, 1897, Art. XCIV.

[58] Development of international law: Act of Feb. 20, 1897, in 29 Stat. at Large, 584.

[59] Advocacy of recourse to law in international affairs: Instructions to American delegates to First Hague Conference, 1899, in Foreign Relations, 1899, 512.

[60] Codification: Instructions to American delegates to Second Hague Peace Conference, 1907, in Foreign Relations, 1907, II, 1137.

[61] Submission of disputes to arbitration: Instructions to American delegates to First Hague Peace Conference, Annex A, cited above, note 45.

[62] Conclusion of arbitration treaties: Instructions to American delegates to Second Hague Peace Conference, 1907, in Foreign Relations, 1907, II, 1134.

[63] Establishment of a permanent court: Instructions, 1907, as cited, 1135.

[64] Judicial settlement preferred to arbitration: Instructions, 1907, as cited, 1135.

even the establishment of arrangements for vesting in such courts obligatory jurisdiction over certain types of disputes.[65]

Finally, the United States has sought to promote the establishment and development of organized International Government generally. The policies pursued in reference to the simplification of diplomacy, the development of international law, and the development of international judicial settlement which have just been reviewed all lead in this direction, particularly the last named. More directly in point still have been our support of the movement for the creation of international administrative unions and bureaus,[66] including many phases of the Pan American movement,[67] and our encouragement of the practice of international conference under appropriate circumstances,[68] which includes other phases of the Pan American system and practice. Last and most important of all comes our promotion of the idea of international federation in Latin America[69] and in Europe, culminating in our action in 1919 in leading the world to the creation of the League of Nations.[70]

POLICIES OF EUROPEAN POWERS AND COMPARISON WITH AMERICAN POLICIES

When we turn to the foreign policies of the leading European Powers prior to 1914 we encounter a situation contrasting very sharply with that just described. That situation may best be stated by reviewing the detailed items in the recent foreign policy programs of Italy, Austria, Germany, France, and Great Britain,[71] and then turning to a more general comparison with the policies of the United States as already summarized.

[65] Compulsory arbitration favored: Instructions, 1907, as cited, 1135. Today we seem to be temporarily in opposition on this point.

[66] International administration favored: International Sanitary Convention, Jan. 17, 1912, in III Treaties, 2972.

[67] Pan-American movement: Address of Secretary of State Blaine to International American Conference, Washington, Oct. 2, 1889, in Sen. Ex. Doc. 231, 51st Cong., 1st Sess., I, 10.

[68] International conference: Instructions to American delegates to Hague Conference, 1907, as cited (note 62, above), 1130. For a case where even abstention from conference seemed to prove a fundamental devotion to the method under all normal conditions, see President Pierce, message to Congress, Dec. 31, 1855, in House Ex. Doc. 1, 34th Cong., 1st Sess., 1.

[69] Encouragement of Central American federation: Ubico to Blaine, June 22, 1881, in Foreign Relations, 1881, 600.

[70] Support of League of Nations in 1918: President Wilson, address to Congress, Jan. 8, 1918, in House Doc. 765, 65th Cong., 2d Sess., 6. The story of the American attitude toward the League since 1919 is known to all; except for a brief period in 1920–1921, however, we do not seem to have ceased to hold at least that the League is a good thing for Europe and the world in general, even though we may not care to join. Today we certainly hold this view and coöperate more and more extensively with the League each month.

[71] The summaries of the foreign policies of European Powers which follow are taken largely from a series of pamphlets published in 1914 and 1915 by the Oxford University Press, under the general title of "Oxford Pamphlets." In every case the material found in these pamphlets calls for correction and expansion by use of other sources.

A sympathetic review of the foreign policy of Italy from 1870 to 1914 fittingly described her policy as "opportunist and complicated."[72] Caution was to be expected because of the handicap of internal difficulties, political and economic; but, on the other hand, independence of influence from other Powers must be reckoned with in the new nationally self-conscious state. Continued "deep-rooted and well-justified suspicion and dislike of France" was felt, together with a corresponding desire for Italian naval supremacy in the Mediterranean. There was the "unchanged natural antagonism to Austria." A policy of colonial expansion in Africa and the Near East was noted. There was, finally, the desire not only to redeem Italian lands still in Austrian power, but to penetrate and dominate Dalmatia and Albania and prevent Austria or any other state from threatening the Adriatic.

Austrian policy from 1867 to 1914 was felt to be based chiefly on the instinct of self-preservation.[73] She had habitually sought to maintain a balance of power in Europe. For her internal situation demanded stability above all things. She was led into a policy of expansion in the Balkans chiefly to complete and cement her Slav holdings. Her anti-Russian policy derived from the same source. Her alliance with Germany and Italy expressed a similar purpose, although her holding of Dalmatia and her desire for Albania brought conflict with the latter. She must, above all, prevent the rise to power of Serbia and the Balkan states generally.

It would be difficult to summarize German policy between 1871 and 1914 without rousing much controversy. But it will be universally agreed that Germany was aiming at colonial expansion in Africa, the Near East, and the Orient, world-wide commercial expansion, and military, naval, and diplomatic leadership, if not dominance, in the world at large.[74] From the attitude taken by her at The Hague in 1899 and 1907 we may say that Germany opposed international arbitration and conference and proposed reforms of the law of naval warfare only in the interest of greater belligerent rights for her smaller naval power. Her geographical position compelled her also to aim at powerful national unity and military defense against potential dangers from East or West. To secure aid from Austria and Italy in these matters became a natural auxiliary policy.

France likewise sought to maintain a powerful army for defense of her northern and eastern frontiers and a strong navy for protection of her northern and western coasts and her colonial empire.[75] She sought to control Belgium diplomatically for similar purposes, to secure British support, and to build up the Russian *entente* to hold Germany in check from behind. Outside of Europe she sought to expand and develop by peaceful penetration,

[72] Italian Policy Since 1870, by Feiling, K., being Oxford Pamphlet No. 10, 1914.

[73] Austrian Policy Since 1867, by Beaven, M., being Oxford Pamphlet No. 9, 1914.

[74] The Germans, by Fletcher, C. R. L., being Oxford Pamphlets Nos. 6 and 7, 1914.

[75] French Policy Since 1871, by Morgan, F., and Davis, H. W. C., being Oxford Pamphlet No. 11, 1914.

annexation, and exploitation, her colonial holdings in Asia and Africa for her own economic profit and to provide troops in the event of war in Europe. Recovery of Alsace-Lorraine and revenge for 1871 was likewise always present in French thought if not in French official policy.

Finally, British policy may be stated more fully, and utilized most effectively to bring out in clearest manner the comparison between American and European policies.[76]

Great Britain's leading tenet of policy has been to aid in the maintenance of a balance of power among Continental European states so that no great naval or military state may dominate the Continent and threaten her across the Channel.[77] This has led to the policy of intervening on the Continent whenever necessary to protect Belgium and the Low Countries from conquest by such a state. It led in the early years of the present century to *rapprochements* with France and Russia aimed to check Germany in what were thought to be her plans of conquest and domination. These were the main items in British policy just prior to 1914, apart from the permanent aim of maintaining and perhaps expanding the Empire as opportunity offered, an aim very prominent a century and a half ago but much less vigorous in recent years.

At an earlier time Great Britain had pursued a policy of "splendid isolation" and allowed Prussia to grow to strength unchecked.[78] She had refused to make commitments for future contingencies and reserved full liberty of action on the facts of each case as they arose. She had preferred to try to rouse European opinion against the strong rather than promise definitely to defend the weak by force of arms. At the same time she had seemed to desire to encourage the national liberties of the peoples of Latin America, Greece, and other revolutionary countries, and she had done what she felt she could do to protect the Bulgarian and Armenian Christians from Turkish persecution.

In maritime affairs Great Britain has until very recently asserted a policy of naval supremacy and even domination, and she has generally resisted restriction of belligerent rights at sea.[79] On the other hand, she has stood for open doors and full freedom of trade and navigation in time of peace and as a neutral during the Civil War in the United States she fought vigorously for neutral rights against the belligerent pretensions of the United States.

[76] For the following summary of British policy reference is made to: The Leading Ideas of British Policy, by Collier, G., being Oxford Pamphlet No. 43, 1914; The Cambridge History of British Foreign Policy, 1783–1919, ed. by Ward, A. W., and Gooch, G. P.; Traditions of British Statesmanship, by Elliott, A.D. (1918); British Foreign Policy in Europe, by Egerton, H. E. (1917); Our Foreign Policy and Sir Edward Grey's Failure, by Perris, G. H. (1912); and The Foreign Policy of Sir Edward Grey, by Murray, G. (1915).

[77] Egerton, Chap. I.

[78] On the Gladstonian foreign policy, see Cambridge History, III, 21.

[79] British maritime policies are stated in Potter, P. B., The Freedom of the Seas, 39–41, 45–47, 59–61, 86–90, 152, 153, 197–198.

Once having abolished slavery in her own territories, she was eager to suppress the slave trade, in which she had taken part earlier; of late years she also has done much, more than any other single power, in the suppression of piracy.

Finally, in the ten years just past Great Britain has stood more and more strongly for "the new orientation of policy which is implicit in the League of Nations."[80] She had always supported the ideal of the judicial or arbitral settlement of international disputes and on certain occasions had pressed for disarmament—land disarmament chiefly—rather forcefully. She now seems to be strongly committed to the whole program of organized international security and coöperation.

The foregoing review of the foreign policies of the leading European Powers suggests certain comments in view of the character of the foreign policies of the United States.

The policies of the United States are obviously of a more general character than those of the European Powers. The program of the United States might be described as a foreign policy made up of general principles and formulated in general terms. We seem to follow certain general ideas as such and seek to apply them as opportunity offers, whereas the European Powers tend to deal with concrete cases, leaving the observer to infer the principle, if any, that is being followed.[81]

A further result is that many of the policies of the United States seem to be addressed to other Powers as much as to ourselves. Or they seem to be addressed to the world at large. They are injunctions or exhortations "to all" to simplify diplomacy or open up international rivers or dispense with great standing armies, or set up world courts, and so on. Some of the policies we support call for no action on our part but demand a great deal of action by others. From the beginning America has had a strong disposition to preach, to tell the nations of the world how certain things should be arranged for the better interest of all concerned, ourselves included.

[80] Cambridge History, III, 617.

[81] To some extent the difference here noted is a difference in the treatment accorded the subject by writers or students in the different countries. Thus Moore, J. B., Principles of American Diplomacy, is arranged on a topical basis, the historical events recited by the writer being employed merely by way of illustration, while Egerton, previously cited, is arranged on a chronological basis, the Introductory Chapter alone being employed to set out the main ideas of British policy and even that chapter consisting of a general survey of the whole subject itself on a chronological basis. Another British student of the problem in correspondence with the present writer, referring to the summary of American policies in the text, above, declared that he knew of the existence of "no such summary for British history (*sic.*)." It appears that this difference is attributable not merely to the historical-mindedness of certain writers (although see Adams, R. C., History of the Foreign Policy of the United States, where history is allowed to swamp analysis of policies), but to the inherently empirical quality of the British program. Let it be remembered in this connection that the situation is even worse when we leave supposedly empirical and non-theoretical England and turn to logical and analytical France!

Third, most of our policies have related to legal or political—better say "governmental"—matters, to points of international governmental organization or procedure. Recognition, Nationality, Arbitration, and so on,—these are problems of international law and government.

By the same token, territorial aims are conspicuous by their absence. Oregon we wanted and sought deliberately—"54° 40′ or fight"—as we had Florida a quarter of a century before. But Louisiana and Alaska and the Philippines we had in our hands before we knew how it happened. The reputed British experience in inadvertent territorial expansion we duplicated in our own ventures. This is made none the less true by spasmodic unofficial ideas about manifest destiny, annexation of Cuba or Canada or Mexico. Our territorial expansion has been largely a vegetative process of merely moving into and settling empty land, imperceptibly and unofficially rather than arbitrarily or violently.

To some extent, of course, the difference here noted is merely a difference of emphasis. This is specially true where the comparison is made with British foreign policy. Territorial and governmental policies both exist to some extent in the American program and in the British program; both exist in the programs of France, Germany, Italy, and, doubtless, Japan. It is merely a matter of emphasis, more or less.

Yet the difference of degree of emphasis amounts to a difference in quality. It would doubtless be possible to discover by investigation where Great Britain stands on the use of costume in diplomacy, or on any or all of the points mentioned in the survey of American policy. And that attitude, once discovered, could fairly be described as an integral part of British foreign policy in spite of the fact that it is nowhere noticed by professed students of that subject. Even so, however, the fact that no emphasis is given by Great Britain to her attitude on such points, while much emphasis is given to the independence of Belgium and the possession and defence of the Suez Canal, indicates the policy or policies to which she attaches most importance, the policy or policies which she considers to be her real and true program of international action, and which have very few if any counterparts in the American program. Furthermore, the fact that the British program alone is comparable with the American in this respect, that the moment we touch the Continent the governmental items disappear almost entirely in favor of purely political and territorial aims, is significant in the same direction.

In short, it may be said that the foreign policies of the European Powers are not based upon generally applicable social, political, or legal principles, not formulated in general terms, and do not deal with problems of international procedure, governmental or administrative, to an extent remotely comparable with the extent to which American policies go in this direction. European policies are specific, detailed, even fragmentary. They are concrete and even materialistic. The whole body of the policy of any one nation

therefore is complex and lacks that symmetry and logical systematic character which it is easy to attribute to the American program. Over periods of time European policies fluctuate more rapidly and more extensively than do American policies. On whatever phase they are tested, American and European national foreign policies seem to betray some hidden fundamental difference which reveals itself in various ways on the surface of international action.

Some further light may be shed on this matter by the idea, not unfamiliar in the European literature of the subject at all events, that a foreign policy is a luxury which only the great and independent Powers can afford, or which only such Powers can manipulate at discretion.[82] Weak Powers can have no program of foreign policy or only a defensive policy such as is forced on them by their hazardous geographical and economic situation, so it is said. It is just this difference in their power and disposition to work out and advance a positive and active foreign policy which is felt to distinguish the great Power from the weaker states which regard foreign affairs only as a regrettable necessity.

Such a position is derived from the assumption that "a foreign policy" naturally involves political aims, that is, highly competitive aims and objectives, aims and objectives which can be sought by one nation only at the expense of other nations. In this sense it might be said, as it has been said now and again, that the United States has no foreign policy, no program of competitive political action comparable with the programs of Great Britain, France, or Germany. Our foreign policies are not real policies of action but mere ideals. Nothing could reveal more clearly the essential difference between European and American policy or, by implication at least, the underlying character of American policy.

What has just been said might seem to carry the implication that the United States, in formulating her foreign policy, has been actuated by generous and altruistic motives rather than by selfish nationalistic purposes, in contrast to the European Powers. Many expositions of American foreign policy, not confined exclusively to the years 1917–1918 nor to ceremonial and festive occasions, and not confined to unscholarly or politically-minded spokesmen, have reflected this view. The picture of America crusading among the nations in the cause of justice and righteousness is not unfamiliar to American students or European audiences. It is a picture with which we all are familiar and of which in varying degrees we are all justly fond, whatever its accuracy.

It is not proposed to launch out in the remainder of these pages upon a cynical denial of the accuracy of this picture. Rather is it proposed to examine the actual facts of American national life and the relation between American policy and these indisputable facts concerning the position of the

[82] Beaven, as cited, 4.

United States in the world of nations. From such an effort we may gain light not only upon the accuracy of the picture of crusading idealistic America, but also upon the reasons for the occupation of such a rôle by America in this ordinarily selfish and nationalistic world. We are to inquire before all whether American policies tally with the facts of American life and the interests to which these facts give rise.

AMERICAN POLICIES AND AMERICAN INTERESTS

The most important fact in America's position among the nations[83] is her geographical location. We are located in the Western Hemisphere, three thousand miles from Europe, as we are so often admonished. We less frequently notice, however, other phases of the situation which are equally important, namely, our position five thousand some hundred miles from Asia but facing that troubled area directly across the Pacific and, most important of all, our position in the same hemisphere with twenty Latin-American Republics. We possess a joint boundary,—the term "frontier" in American life refers to the struggle against nature rather than against a neighbor nation,—over a thousand miles long in common with one of those republics. Of the same order are the equally obvious geographical facts that we possess three extended continental coast lines, one on the Atlantic, one on the Gulf of Mexico facing the West Indies and the Caribbean, and one on the Pacific. To these may be added the fact, not likely to be forgotten by anyone within newspaper distance of Chicago, that we possess a great interior valley which is cut off in some degree from both the Atlantic and Pacific seaboards.

Of great importance for our economic life is the geographical fact that we enjoy a most beneficent and moderate climate, a moderate climate which at the same time varies from sunny Florida and California to the snows of Maine and Montana. In the economic order of things properly speaking must be recorded our enormous natural resources, fish, timber, minerals, soils and human talent, and the paramount fact that until very recently we have occupied the position of a new country, economically speaking, a country needing above all else exploitation of its own internal wealth. These facts, together with our extended coast lines, have led, still remaining within the limits of economic thought, to the development of great shipping, fishing, agricultural, lumbering, mining, and manufacturing activities which have in turn become foundation facts in the national life.

As time has passed the economic situation of the country has, of course, altered from time to time. Fishing and shipping activities have waxed and waned and recovered again. From being a new country economically we have reached industrial and financial maturity. From being an importing and a borrowing nation we have become an exporting and lending nation as

[83] The facts alluded to in the following paragraphs are all so familiar that no citations to authority or evidence is believed to be necessary; the facts may, however, all be verified by reference to standard atlases and statistical publications such as the Statesman's Year Book.

our agricultural surplus has appeared, our manufacturing plant has become able to meet our own needs and produce an exportable surplus as well, and our capital accumulations have reached such proportions as to enable us to pay our debts and loan funds to other nations also. All of these changes are of decisive importance, but they do not invalidate the principal proposition about to be advanced; they merely demand to be taken into account in formulating that proposition.

Finally, notice must be taken of certain ethnological and political facts of decisive bearing on the national life. We began as a British people—English, Scotch, and Irish. But we later received strong admixtures of negroes, of Jews, of Italian, Germanic, Slavic, and Scandinavian people, not to mention the few Chinese and Japanese who have come to our shores. In the latter sense we are, therefore, now a polyglot people, an immigrant state, although we have never quite lost our predominantly British character, ethnologically or culturally, at least in the fields of law, legal or political philosophy ("a government of laws, not of men"), in language and literature, and to some extent even in social and economic thought and practice. That we began our national life by colonial revolution against Great Britain does not alter this situation, nor is it to be overlooked as a fact having its own importance in our national history, inappropriate as it may be to refer to that fact only at the end of this statement of the foundation facts of American national life.

We may now proceed to an examination of the correlation between American policies as actually promulgated and the material facts just reviewed. If the correlation prove to be very close on many of the points involved, the inference of cause and effect might be more reliable than an attempt to reconstruct the historical origins of our foreign policies by upturning and interpreting the words and motives of Secretaries of State and Presidents from the dim and distant past. Furthermore, the simple fact that our policies had been deliberately framed with national advantages in view would not touch the core of the problem. Altruistic motives might have been present also. And the main point we have in mind at this stage of the discussion is not concerned with the historical process involved and the motives actuating the fathers of American policy, but with the actual results in the field of national interest and policy and international relations. The main point now is not that the framers of American policies tried, if they did try, to formulate policies which would serve the national life, but that they succeeded, and that our policies do in fact tally with our national needs and interests.

Once such an examination or correlation is begun, it is difficult to resist being swept away by it. Thus our policy or attitude regarding expatriation and naturalization—on the part of peoples of other lands—met our need for immigrants and citizens. And the change in our immigration policy in recent days has come, of course, not because of any alterations in our beliefs

concerning the righteousness or reasonableness of emigration, immigration, and naturalization, but because we have enough population, at least population of certain types, and some to spare.[84] At all stages our policy on this subject has matched our interest very neatly.

From the very beginning, likewise, our policy on recognition tallied with the fact that we ourselves had needed such recognition from 1776 to 1783 and could obtain it only if legitimist scruples were disregarded. It tallied with our interest in seeing revolutionary and republican states multiply in a predominantly power-ridden monarchical world. It was our first essay, this policy, in making the world safe for republics. In more recent years, as our interest in constitutional stability has increased, and our interest in governmental stability in Latin America particularly, the emphasis which we have placed on certain previously subordinate qualifications of our recognition policy has been developed until it has seemed to some students to involve a reversal of our fundamental position on this whole matter. But the aim of encouraging the establishment and maintenance of republican institutions was always implicit in our recognition policy, and the policy was not, therefore, a policy of pure *de factoism*.

And so on through virtually all of the items of our foreign policy. Our demand for free seas in peace and war tallied with our earlier fishing and shipping interests and activities and with our commercial relations of more recent days. The open door policy has tallied with the increased activities of our promoters and bankers, after 1900, and the fact that we hold no spheres of influence in China or Persia or elsewhere. Our anti-militarist policy coincided with our lack of armies and navies and our unwillingness to spend money to build them, our peace policy with this relative military weakness. The neutrality policy fitted our needs so completely that, in earlier days, at least, neutrality seemed not more a deliberate policy than a simple geographic-political fact of American life. Neutrality also served our export trade in time of war. And the Monroe Doctrine served our national interests in this hemisphere as though made for the purpose, as it was.

When we turn to the last group of American policies, those calculated to promote organized international government, the correlation of policy and interest in the American program is all the more interesting because of the fact that it is here that America the crusader is most frequently mentioned. Yet it is strikingly true that the simplification of diplomacy, the substitution of legal settlement for diplomatic bargaining, and the development of arbitration are exactly the policies calculated to serve a crude republic, inexperienced in diplomacy, and weak in force of arms, which was not in position to compete with monarchical Powers in precedence and ceremonialism or with great military Powers on the field of battle. That they corresponded to our Anglo-American legalistic prepossessions in the field of government also was only added merit in our eyes. Finally, organized international coöpera-

[84] See above, note 2.

tion as a whole corresponds closely to our interest in seeing the world of nations rendered peaceful and prosperous so that we need not be drawn into a world war again as in 1798, 1812, and 1917, and may find all our commercial customers peaceful and solvent.

Far from being merely altruistic and idealistic, therefore, American policies have served American interests about as skillfully as the policies of any old-world nation have served the interests of that nation. In spite of their general and even theoretical character, they succeed in ministering to our advantage about as effectively as, probably more effectively than, German, British, or French policies have ministered to German, British and French needs in their particular cases.

This is not to deny, let it be repeated, that much of the motive power back of American foreign policy has been of a generous and altruistic character, especially in the popular mind, any more than what was earlier said in comparing the content of American and European policies was intended to imply that American policies were wholly altruistic in motivation. No one can deny, as no one should wish to deny, that America has at certain times and in connection with certain questions gone crusading for a better international world. It is merely to insist that as a matter of actual fact our foreign policies do in point of results derived from their application serve our national needs and interests very completely indeed.

From this we may turn finally to the relation between American policies and the interests of the other nations of the world with which we have had to deal. If American policies are such as to promote American interests so powerfully, how have they been received by other nations? And why have they been so received?

RECEPTION OF AMERICAN POLICIES ABROAD

What the world in its turn has thought of American policies may best be discovered by investigating the fate which they have met when launched in the arena of international politics. Have other nations resisted these policies and have they resisted them successfully? Or have our policies been accepted by the nations, and, if so, for what reasons—because of our power or because of the justice inherent in, or general advantages to be obtained from acceptance of, our views?

The fact of the matter is that in most cases the separate items of American foreign policy have been taken up and incorporated into modern international law in very nearly their original form. Directly or indirectly the United States of America has written much of the law of international relations which now governs the older states of Europe, where that law originated, and the very different states of far distant Asia.[85]

[85] In the paragraphs which follow, references are of purpose given to a leading non-American work on international law in the English language, Lawrence, T. J., Principles of International Law, 7th ed., and to certain strictly international evidences as to the content of that

Thus the policies of the United States on Nationality[86] and Recognition[87] have been adopted by the community of nations substantially intact. All of the items of our policy regarding free seas in time of peace are law today,[88] and prior to the World War our policies for free seas in war had very nearly attained complete adoption and ratification by even the great naval Powers.[89] So for the policies of the reception of alien merchants[90] and the open door,[91] in principle at least. So for the whole great subject of neutrality and neutral rights, an American invention and creation almost in its entirety.[92]

Certain American policies are only now coming to success in the international field. Such are the policies regarding demilitarization and disarmament,[93] the suppression of the practice of territorial conquest,[94] and the whole idea of international administration, arbitration, conference, and federation.[95] The relatively simpler proposals of diplomatic reform, reduction of rank and ceremonial, equality of treatment, had already been carried out more successfully.[96] Even though it has taken time, however, the world finally possesses, and American policy gave them to the world, a League of Nations and a World Court.

There is no need to go into this matter in greater detail. The ratification of the Monroe Doctrine in the League Covenant,[97] the application of the mandate system,[98] invented in its present form in 1906 by Roosevelt and

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law. In referring to Lawrence it will not always be possible to cite statements directly in point, because of the form in which Lawrence is written. Instead, references will be made to sections of that text wherein certain topics are treated.

[86] Nationality in international law (principle of indelible allegiance abandoned, naturalization permitted): Lawrence, § 96.

[87] Recognition: Lawrence, §§ 46, 47. The nations are still largely following our earlier misconceived policy of *de factoism;* the necessity of popular support for obtaining stability in a new government must bring them as well as ourselves to the more mature position.

[88] Freedom of the seas in time of peace: Lawrence, §§ 85–92.

[89] Freedom of the seas in time of war: Lawrence, §§ 181–194, 241–262.

[90] Status of alien merchants: Lawrence, §§ 97, 98.

[91] Open door: Among other examples which might be given, the rule adopted for "B" Mandates under the League of Nations provides the clearest illustration here. Covenant of the League of Nations, Art. XXII, Par. 5.

[92] Neutrality: Lawrence, §§ 222–233.

[93] Demilitarization and disarmament: See projects and plans adopted in Covenant, Art. VIII and IX.

[94] Suppression of conquest: Again the Covenant provides the best though not the only example. Covenant, Arts. X and XXII (Par. 1).

[95] General international organization: Covenant, entire.

[96] Simplified diplomacy: Lawrence, §§ 123, 127, 128.

[97] Monroe Doctrine in the League Covenant: Covenant, Art. XXI; on interpretation of same, see Adams, 402.

[98] Mandate system: Covenant, Art. XXII. On the special question of sovereignty (no conquest) over the mandated territories, see Wright, Q., "Sovereignty of the Mandates," in this JOURNAL, Vol. XVII, No. 4 (Oct. 1923), 691.

Root,[99] to colonial territories under the League, as well as other items, might be added. But the situation may be summarized in a few words with little inaccuracy: the foreign policies of the United States, barring one or two exceptions of detail, have been adopted by the nations and incorporated into international law for general application. Certainly this is true of American policies as it is true of the foreign policies of no other nation in history. International law beyond what it was in 1789 is largely a digest of American foreign policies and activities.[100]

Moreover, these American policies have been taken up into general international practice by the free will and consent of the nations. In 1789 the law of nations ran counter to American views, and the nations of Europe resisted the American innovations at first—as witness the events of 1793, 1798 and 1812, among others; hence the victory for American principles has been no empty victory won in the absence of any criticism or resistance. But the nations finally yielded when they did yield not because compelled to do so by American military or economic power. Most of our victories in this field, indeed, were won before we had developed such military or naval power as would have supported any attempt to lay down the law to other nations. Most of our victories were won while America was regarded precisely as a country where ideas and words and aspirations, but not threats, took the place of information and facts and power in international dealings. The interesting thing is that the ideas and the words and the aspirations won out. And they have won out to an extent which indicates the presence of some powerful cause at work under the surface of the whole historic movement which has not yet been clearly revealed. Why this universal voluntary acceptance of what were originally nothing more or less than the peculiar policies of the United States of America?

With this stage reached we come face to face with the central problem concerning the nature of American foreign policy. That problem may be stated thus: Granted that such foreign policies have been more or less deliberately adopted by the United States as serve its own national needs and interests, how does it happen that those policies have been capable of being cast, and quite spontaneously have been cast, in terms of general legal and governmental principles concerning international relations at large, so that they have plainly appeared to be non-competitive and even conducive to the promotion of the welfare of the nations of the world as a whole, as is shown by their acceptance by other nations and incorporation into general international law, in contrast to the opportunist competitive concrete political

[99] Origins of the mandate system: Potter, P. B., "Origins of the System of Mandates," in American Political Science Review, Vol. XVI, No. 4 (Nov. 1922), 563, and Vol. XX, No. 4 (Nov. 1926,), 842.

[100] For a general view, by a second non-American, of American contributions to international law, see Hall, W. E., Treatise on International Law, 8th ed., 46, 99, etc. (index, "United States").

aims of the European states? What is there, or has there been, in the historic position of the United States in the world of nations which has produced this situation, quite apart from any considerations of motives or purposes, ideas or ideals?

THE NATURE OF THE AMERICAN INTERNATIONAL POSITION

In attempting to explain the paradox concerning American foreign policy which has just been stated, one has not, after all, to seek far. It is only logical that we should simply turn to the factors which have made American policy what it is. It merely becomes necessary, that is, to survey again the essential facts of American life which have given birth to the various items of American policy. In doing so, however, the point to be noted now is not that which was noted some pages back. The more important point is not that those facts produced those policies, but that facts of a certain character produced policies of a certain character, not nationalistic but internationalist policies, as they may now be described, policies of general benefit in contrast to the mutually exclusive and competitive policies of the European powers.

The feature of the American position which was first responsible for the internationalist character of American foreign policy, was, of course, nothing more or less than our fortunate removal from the traditional rivalries of the European nations. Our geographical location relieved us from embroilment in the perennial Franco-German feud, the Turko-Balkan imbroglio, and the Teuton-Slav rivalry. For this reason before all others it was open to us to pursue an internationalist policy.

The simple geographical fact that we do not have many near neighbors, territorially speaking, has had a similar effect. It has been said by one writer who was thinking of foreign policy in terms of policies regarding territorial expansion that the opportunity which we have had of developing our territorial possessions without coming in contact with other nations has resulted in our not having to be much concerned with problems of foreign relations.[101] This is at once to say too much and too little, but the fact is that absence of neighbors geographically has helped greatly to relieve us of the necessity of developing strongly competitive foreign policies and to enable us to formulate largely non-competitive or internationalist policies.

This absence of neighbors has, on the other hand, operated in an opposite direction also. It has led us to neglect, to some extent, the problem of international relations as a whole, and, particularly, it has resulted in our being less eager for certain forms of international coöperation, international ad-

[101] Adams, already cited, 134, quoting Turner, F. J., The Frontier in American History, 169: "By this peaceful process of colonization a whole continent has been filled with free and orderly commonwealths, so quietly, so naturally, that we can only appreciate the profound significance of the process by contrasting it with the spread of European nations through conquest and oppression."

ministration especially, than we would have been if we were located geographically as is Switzerland, for example. If it has not produced a positive policy of isolationism, our paucity of near neighbors has at least reduced the vigor of our policy of international coöperation.

The reverse of this situation is seen in our geographical relations to the Latin American states. Our relative nearness to them, as compared with our distance from Europe and Asia, has led to the Pan American policy and to the policies of supervision and responsibility toward Cuba, the Caribbean and Central American States, and toward Mexico in particular, which outtop any plans of coöperation we have entered into with Europe.

Taking into account also our Far Eastern policies, it is possible to make a still more precise and at the same time comprehensive statement on this matter. To an extent not true of the European or Asiatic nations nor even to the same degree of the Latin American nations or Canada, it may be said that the United States occupies a central location on the surface of the earth, with Europe,[102] Latin America, and Asia circling around her, all directly accessible from her shores by three great open oceans. As a result our European, Latin American, and Far Eastern policies are more evenly developed and balanced in importance and maturity than are the American (including Latin American) and far Eastern policies of the European Powers or the American and European policies of the Asiatic Powers. America stands in a real sense in the center of the circle of the nations, and this position is likely to be enhanced rather than diminished in significance as the Latin American and Asiatic nations develop in power and importance in the future.

It is, indeed, at this point that the causes for the positive international policies in the American program emerge. The absence of European rivalries and the absence of near territorial neighbors were merely negative in their effects, relieving us of the necessity of pursuing strongly competitive policies. It has been other facts which have led to an active constructive internationalist program on the part of the United States.

The presence of the Latin American nations in our own hemisphere has been one of the chief of those facts. To the effects of this fact reference has just been made.

Our long coast lines have likewise contributed constructively and creatively to the internationalist character of our foreign policies, opening us out as they do to all the maritime nations of the world. The shipping activities engendered along our coasts, serving both our export trade and our shipping industry proper, though at different periods in our history, perhaps, have but given concrete form to this influence and led to our policies of free international navigation. One has but to note the strongly nationalistic or at least provincial attitudes of our great interior valley and the interior plains of Russia to realize how this operates. Chicago and Moscow feel that they

[102] Including the Near East.

have little to do with international affairs; not so Vladivostok, Odessa, New York or San Francisco.

Third, the variety of our climate and resources and economic life, including the high level and breadth of taste of our standard of living, have definitely broadened the international character of our policy as has the variety of the racial or national elements in our population. All of the elements of variety in our economic life have produced a variety in our imports and exports, and hence in our contacts with, and our understanding of, other nations. We import from all corners of the globe and we seek markets among all peoples, with inevitable results on our familiarity with the world at large. The hybrid character of our population particularly has made our national outlook on international politics a composite internationalist outlook just as it has made a compact national policy or a policy directed against any foreign Power or a policy of national sympathy or alliance with any one foreign nation, difficult if not impossible. And so far as we are, on the other hand, still a British nation that in turn has merely produced a sympathy with the somewhat internationalist policy of Great Britain.

The fact that we have been until very recently at least a new country politically, socially, and economically has contributed to the same result perhaps most powerfully of all. We may be in contact here with a phenomenon similar to that encountered in the field of personal life where it is largely true that the rules of health and social treatment essential for the young are such as would also be salubrious for the adults of the species if they could only be made to adopt them. At all events, it was our newness in the field of national life that led to our adoption of the policies of free recognition for new popular governments, the right of expatriation and free migration for individuals, and equality of treatment in commerce, navigation and cable communications, not to mention the open door in colonial exploitation for late comers in that field. The new nation could not, for lack of industrial equipment, compete with the older manufacturing nations, but was forced to confine itself to non-competitive exports of food and raw materials. Without colonies or spheres of influence of its own to exploit, we felt no disposition to adopt an exclusionist policy ourselves and we naturally objected to monopolistic controls of all sorts, political, social, and economic, already set up by the older states; we thus promoted a social-internationalist policy which could not fail to benefit the world at large if or when once accepted.

Here also, of course, our newness economically led at one time to severe preoccupation with our own internal development and thus reduced our interest in international affairs, if it did not actually produce an anti-internationalist attitude. Until we reached some degree of maturity, that is, we were not as positively internationalist in outlook as we were later to become. Until we could get our own affairs straightened out and produce something wherewith to trade with other nations we were not much interested

in "abroad." Once out of the period of preoccupation with our own internal growth, however, we adopted to the full the attitude already described.

We may now in conclusion summarize these inferences concerning the reasons for the internationalist policy of the United States in explaining why the United States has made a good citizen in the world of nations, why there has been this peculiar coincidence of nationalist and internationalist interest in the American position, and what is to be the nature of American foreign policy in the years to come.

The nation which is most likely to contribute helpfully to the sound and hopeful development of international coöperation, to view the problem in the abstract for a moment, would appear to be a nation located somewhere outside of Europe, free, at least during the period of growth and expansion, from too many near neighbors but not entirely removed from international contacts. Such a nation should, indeed, occupy a central location among the nations; Panama has the ideal location. It should be a maritime nation. It should possess a variety of resources and economic life and products, have passed out of the immature, preoccupied, unproductive stage of national childhood, but not have reached the stage of selfish adult power. It should be a polyglot immigrant country and a state founded on a popular political movement. It should be a legalistically minded nation, and one needing the protection of law and order in international affairs. Such, judging by the fundamental principles which have been written into the law of nations under American leadership, are the prerequisites for good citizenship in the community of nations, for helpful participation in the promotion of organized international coöperation.

For the one hundred and fifty years now past the United States has occupied just such a position, an unbelievably suitable position for promoting internationalist development. She has been the first great Power to occupy such a position. The real explanation, therefore, of the paradox involved in the spectacle of American policies, framed to serve American interests, being taken up and written into general international practice, is found in the fact that by the peculiar circumstances of her geographical situation and political, economic, and social life, America was inevitably impelled to adopt policies which in their very nature were conducive to general international welfare. A situation and a result more exceptional and at the same time of happier consequence to all concerned can hardly be imagined.

For the future we have nothing but speculations. Certain developments may, however, be noted already. It is noticeable, for example, that still further development of our economic life has already produced a definite effect on our national policy. Coming to full maturity at last we do not maintain exactly the same outlook on the world as that which we possessed during our earlier days of national growth. A situation has now developed where we are no longer young and immature politically, socially or economi-

cally, and the effect of this alteration in circumstances is detected in various fields of our foreign policy.

To begin with, of course, the development of our shipping activities, of our traveling activities also for that matter, of our export surpluses in raw materials and manufactures, of our lending ability, has made us more than ever disposed to find profitable international contacts in these connections. To that extent we have been taken into international relations even more actively than ever, so that even Chicago is now interested in the International Chamber of Commerce.

But with these developments has also come an increased sense of national power. The result has been an increase in the nationalistic character of our foreign policy. The child no longer needing social, that is, international, coöperation for his nurturing and protection, is about to leave the nursery, and the adult is asserting his power, his national power, to take what he wants by his individual strength in the open arena of world politics. This raises issues too profound and extensive to be disposed of here, but perhaps it may be suggested that it may have been a good thing for the world that the United States did not reach the maturity of her competitive power earlier, while international competition was still unrestrained by even such mild international institutions and regulations as we now possess. It will be interesting, and of tremendous importance, to see whether this contemporary development of American national power leads her to obstruct the establishment of such restraints on violent national action and to insist on a prolongation of the cut-throat competition of the preceding generation.

If the United States thus seems about to join the imperialistically minded Powers, they seem, on their part, to be passing into a still more mature stage of national development which remains to be studied and appreciated in its true character along the lines laid down in these pages. They seem to be about to abandon the arena for the sanitarium, or to convert the former into the latter! On the other hand, the Latin American states, above all Brazil, seem to be outgrowing their childhood and succeeding to the position occupied by the United States fifty years ago. The United States seems to be on the verge of surrendering the leadership in promoting internationalism to younger nations more suited to the task. This in its turn is a startling situation.

All this is rather speculative, however, and may be left to stand on the speculative plane. What is not speculative, to review finally the main ideas advanced in these pages, is the body of policies actually adopted by the United States in her relations with other nations in the past, the generous international character of those policies in comparison with the competitive nationalistic policies of the European Powers, the adoption of American policies into the general law of nations in spite of the fact that they were of such character primarily as to meet her own needs and interests, and the explanation of that paradox by reference to the peculiar geographical, eco-

nomic, and social facts of American life. This constitutes a phase of world history for which there exists no adequate parallel in the lives of the nations. It constitutes the permanent contribution of American national foreign policy to international evolution.[103]

[103] It has been suggested to the writer by Mr. Harold A. Cranefield, a student at the University of Wisconsin, that the fundamental causes of the phenomena here under examination are to be found in the changing economic conditions and theories of succeeding periods in modern international history. The older European policies, territorial annexation, colonial exclusion, monarchical legitimacy, indelible allegiance, were based on primitive economic and political conditions of national life and on physiocrat and mercantilist economic and political theories. The conditions and policies of America were produced by the industrial and commercial and political revolutions of 1750–1850; increased production and transportation, increased demands for food and raw materials, surplus capital and population, all led to emigration, colonial independence, demands for open doors, freedom of navigation, and all the rest. The same developments made European Powers ready to listen to the American proposals, America being only a little ahead in the general evolution, and for obvious reasons. The whole movement, in this view, has been but a phase of world evolution in the field of economic and social relations, in which America played only an accidental part.

With the general view thus expressed the writer is in full agreement, and the interpretation appears to him to be very suggestive and striking. But in estimating its exact scope there are several things to be noted. Some of the American policies seem to be attributable to causes independent of those to which reference has just been made; the policy of legalism seems to derive mainly from our English background and lack of military and diplomatic power in the United States, and only very remotely from the industrial revolution, unless we understand by the latter a peculiarly English event and the event responsible for English overseas colonization. In which case how explain Spanish overseas colonization and early English colonization? It were probably more accurate to attribute many of the American policies and the reception accorded them by the other nations to the evolution of the world state-system in general, the expansion of Europe, the appearance of national constitutional states to supersede personal principalities and empires, and the lapsing of the mercantilist system, but not the latter alone. Many of the typical policies of the European Powers have not disappeared with the mercantilist system, or, for that matter, with the general acceptance of American policies and ideas, but linger on today. In any case we are concerned here not so much with general cosmological causes, but with causes and effects within the order of thought of international relations. Studied on that plane, on the plane of relations among the nations as we know them, the problem seems to work out as indicated in the text.

NEUTRALIZATION AS A MOVEMENT IN INTERNATIONAL LAW

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Writers on the history of the law of nations, in dealing with neutralization as an accepted practice, have seldom given a satisfactory account of the development of the ideas underlying this unusual phenomenon in international law. They have, in general, been inclined to treat it in a rather fragmentary manner; merely to note in passing certain scattered instances as of minor importance and to devote their major attention to the more outstanding occasions on which the European Powers have settled some given problem by the use of the formula of neutralization. It is thus rendered exceedingly difficult to form an objective appraisal of the ideological forces back of the movement, or effectively to analyze and weigh the constituent elements entering into it. In consequence, the movement has for the most part escaped scientific evaluation.

The confusion in regard to it has been due, on the one hand, to its connection with the law and custom of neutrality and with the system of interstate relations by which neutrality is itself conditioned, and, on the other, to its relation to the various kinds of treaties of guarantee with which neutralization is almost invariably associated. When, added to these two basic sets of relationships, varying types of international servitudes are considered, the problem of the analysis of neutralization becomes increasingly complex. If, finally, the movement is related to its historical and conceptual background, is viewed in relation to the ideology of different periods, it reaches the acme of complexity. Nevertheless, its proper evaluation demands consideration of these factors.

Fortunately, the approaches to a critical evaluation have been facilitated in part by the assiduous labors of scholars in various countries themselves subject to the régime under consideration.[1] These are, however, for the most

[1] Such as Arendt (*Essai sur la neutralité de la Belgique*, Brussels, 1845), the two Descamps —Baron Edouard (*La neutralité de la Belgique au point de vue historique, juridique et politique*, Brussels, 1902) and Emmanuel (*L'Etat neutre à titre permanent*, Paris, 1912), Dollot (*Les origines de la neutralité de la Belgique et le système de la barrière, 1609–1830*, Paris, 1902), Hymans (*La neutralité de la Belgique*, Paris, 1915), Nothomb (*La barrière belge*, Paris, 1916), Waxweiler (Belgium Neutral and Loyal, London, 1915) and Woeste (*La neutralité belge*, Brussels, 1891) in Belgium; Eyschen ("La position du Luxembourg selon le Droit des Gens," *Revue de Droit International*, XXXI, 1899), Servais (*Le Grand-Duché de Luxembourg et le Traité de Londres du 11 mai 1867*, Paris, 1879), and Wampach (*Le Luxembourg neutre*, Paris, 1900) in Luxemburg, and Calonder (*Ein Beitrag zur Frage der Schweizerischen Neu-*

part isolated studies, lacking the necessary correlation to the other movements of their times, and are in addition colored to an appreciable extent by nationalistic bias if not by an ill-concealed desire to explain away, through meticulous interpretation of treaties and constitutional documents, the disabilities under which the respective countries neutralized have been placed. Of more value have been the historical researches of students of neutrality in general[2] and of conventional neutrality in particular,[3] embracing various studies of both the pre-war and post-war[4] period. In addition, the discussion produced during the World War by the violation of the various neutralized areas[5] has provided a controversial literature which has, on the whole,

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tralität, Zurich, 1890), Hilty (*Die Neutralität der Schweiz in ihren heutigen Auffassung*, Bern, 1882), and Schweizer (*Geschichte der Schweizerischen Neutralität*, Frauenfeld, 1894) in Switzerland.

[2] Such as Nys ("Notes sur la neutralité," *Revue de Droit International*, 2e série, II, and III, 1900–1901), and Kleen (*Lois et Usages de la neutralité*, Paris, 1898).

[3] Among such may be noted Baumgartner, F. W., "The Neutralization of States," Bulletins of the Departments of History and Economic Science in Queen's University, No. 24, July, 1917, pp. 54–89, and No. 25, October, 1917, pp. 1–32; Hagerup, F., "La Neutralité Permanente," *Revue de Droit International Public*, XII, 1905; Morand, M., "Les origines de la neutralité perpetuelle," *idem*, I, 1894; Piccioni, C., *Essai sur la neutralité perpetuelle*, Paris, 1902; Sherman, Gordon E., "The Permanent Neutrality Treaties," Yale Law Journal, Vol. 24, pp. 217–241, January, 1915; Westlake, J., "Notes sur la neutralité perpetuelle," *Revue de Droit International*, 2e série, III, 1901; Wicker, C. F., Neutralization, London, 1911; and Wilson, G. G., "Neutralization in Theory and Practice," Yale Review, Vol. IV, pp. 474–486, April, 1915.

[4] *Cf.* Huber, Max, "Problèmes relatifs à la Société des Nations" printed as Annexe I, 4 to the *Message du Conseil Fédéral à l'Assemblée Fédérale concernant la question de l'accession de la Suisse à la Société des Nations (du 4 Août, 1919)*, Berne, 1919, pp. 228–239; Littell, C. F., The Neutralization of States, Meadville, Pa., 1920; and Roussel le Roy, Andre, *L'abrogation de la neutralité de la Belgique*, Paris, 1923.

[5] The neutrality of the Grand Duchy of Luxemburg, guaranteed by the Treaty of London of May 11, 1867, was violated by Germany August 2, 1914 (*Neutralité du Grand Duché pendant la guerre de 1914–1918: Attitude des Pouvoirs publics*, Luxemburg, 1919, pp. iii, ix, xii, lx, 1–14), and by Austria in April, 1918 (*ibid.*, p. 20). *Cf.* also Renault, Louis, *Les premiers violations du Droit des Gens par l'Allemagne*, p. 18. Belgium's neutrality, established by the Treaty of London of April 19, 1839, was violated August 4, 1914, by Germany. (*Cf.* United States Naval War College, International Law Documents, 1917, pp. 53, 86.) Corfu and Paxo were neutralized by Article 2 of the Treaty of March 29, 1864, and the King of the Hellenes was obligated to maintain their neutrality (British and Foreign State Papers, Vol. 54, p. 11). At the end of 1915 the Allied Governments occupied Corfu and transferred thither the remnants of the Serbian army over the protest of the Greek Government and king (London Times, January 13, 21, 1916; Ion, T. P., "The Hellenic Crisis," this JOURNAL, Vol. 12, p. 575). The Congo, neutralized by Article X of the General Act of the Berlin Conference of February 26, 1885, was violated by the British and French Governments in the middle of August, 1914, despite the desire of the Belgian Government that it remain neutralized and inviolate. (*Cf.* Belgian Gray Book, pp. 333–342, and Transactions of the Grotius Society, Vol. I, pp. 80–85.) The neutrality of the Straits of Magellan was violated in 1915 by the capture by a British cruiser of the Norwegian ship *Bangor* in "neutralized" waters, on a charge of unneutral service. In validating the capture, Sir Samuel Evans admitted that it took place in neutral territorial waters "neutralized forever" by the treaty

been an unequivocal arraignment of neutralization both on the ground of its practical inefficiency and because of its conflict with prevalent concepts of political theory.[6] Moreover, the abrogation or fundamental modification of several important treaties of neutralization in the course of the peace settlements following the World War[7] has brought to the fore not only a critical discussion of the reasons alleged by the great Powers for the abandonment of arrangements previously conceived of as essential to the peace of Europe, but also a juridical analysis of the changed set of legal relationships flowing from a new state system, which threatens presently to exterminate the régime of neutralization. Finally, the renewed interest in general treaties of guarantee as the new bases of the security of Europe has produced a new attitude towards treaties of neutralization, in so far as the reciprocal character of the guarantees involved is concerned.

In view of these various developments directly or indirectly affecting the neutralization movement, a reconsideration of its origins and of the various phases through which it has passed is not inappropriate.

Historically, neutralization is a concept and creation of the nineteenth century, such early examples of conventional neutrality as instanced in the history of the Principality of Liege[8] and the Channel Islands[9] having been

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of July 23, 1881, between Argentina and Chile (British and Foreign State Papers, Vol. 72, p. 1103), but brazenly avoided "any expression of opinion on the character of the Straits of Magellan as between Chile and other nations." (*The Bangor*, Law Reports [1916], Vol. 87, A. C., pp. 218 *ff.*) The legal obstacles presented by the neutrality of the Suez Canal were conquered by the British proclamation of a protectorate over Egypt, November 3, 1914. It has been pointed out by Lord Cromer, however (Modern Egypt, II, 384), that the canal was in reality "internationalized" and not "neutralized" despite the wording of the Constantinople Convention of 1888.

[6] Such is the view of Baumgartner, *op. cit.*, esp. 25: 30–32, Roussel le Roy, *op. cit.*, pp. 25–33; Redslob, Robert, *Histoire des Grands Principes du Droit des Gens*, pp. 35–6, 380.

[7] By Art. 31 of the Treaty of Versailles the signatories, "recognizing that the treaties of April 19, 1839, no longer correspond to the requirements of the situation," abrogated their stipulations and deneutralized Belgium. By Art. 32 "neutralized" Moresnet was ceded to Belgium; by Art. 40 the treaties neutralizing Luxemburg were renounced by Germany, while all parties accepted "the abrogation of the régime of neutrality of the Grand Duchy." By Art. 435 and its annex, the neutralized portions of Upper Savoy were deneutralized and relieved of the military servitudes imposed in 1815. The status of Switzerland, being protected by a recognition of its policy of permanent neutrality and by an additional territorial guarantee, remained unaltered. By Art. 13 of the Convention of Saint Germain of September 10, 1919, the provisions of the Berlin Act of 1885 relative to the neutrality of the Congo Basin were abrogated. (*Cf.* Malloy, Treaties of the United States, III, 3745.) The deneutralization of Belgium has received confirmation in Art. 1 of the Belgo-Dutch treaty of April 3, 1925 (*L'Europe Nouvelle*, Vol. VIII, pp. 1125–9, August 22, 1925), and in the Locarno Security Pact of October 16–December 1, 1925 (Preamble). (This JOURNAL, Vol. 20. Supp. pp. 21–22.)

[8] *Cf.* Knight, W. S. M., "Neutrality and Neutralization in the 16th Century," Journal of Comparative Legislation and International Law, 3rd Series, Vol. II, pp. 98–104, citing Henaux, *Histoire du Pays de Liége*, II, 237–238.

[9] *Cf.* Nicollo, E. Toulmin, "Neutrality of the Channel Islands," Journal of Comparative Legislation and International Law, 3rd Series, Vol. II, pp. 238–244.

only isolated and disconnected instances at periods when the whole political alignment of Europe was in flux. The later seventeenth and eighteenth century projects of neutralization emanating from France with respect to the Low Countries may rightly be regarded as having formed part of the Barrier System[10] which characterized and embodied the spirit of the diplomacy of the period. The attempts to impose conventional neutrality upon Malta under the Treaty of Amiens[11] proved futile, and it may safely be said that before the meeting of the Congress of Vienna, no far-reaching application of the idea had been made.

The extensive application of the principle at the time of the Vienna settlement to Savoy,[12] Moresnet,[13] Cracow,[14] and, ostensibly, to Switzerland[15] leads to a consideration of the motives in the interest of which the great Powers neutralized these areas. The general principle back of the settlement was not only dynastic restoration after Europe's first orgy of republicanism, but also a return to a military, diplomatic and political equilibrium, a creation of a new balance of power. An examination of the protocols, documents and treaty stipulations involved in the neutralizations reveals the desire to preserve the new-found balance of power as the underlying or openly expressed motive in each instance. Such was also definitely the case in relation to the neutralization of Belgium, as the European Powers did not desire to see the settlement of 1815 reopened, nor the alignment of forces disturbed by each outbreak of revolution. Lastly, when, upon the breakup of the old German Confederation, the Grand-Duchy of Luxemburg was left to its fate, the equilibrative principle was once more invoked as a justification for the neutralization of the diminutive state.

The arrangements of the Congress of Vienna were not territorially altered by the revolutions of 1848; rather was the addition of the Ottoman Empire to the European Concert in 1856 the factor that disturbed the balance of power and made new political adjustments necessary. But now the equipoise was no longer one relating to the land areas of Europe, and various devices had to be set up to restrict the naval and military power of

[10] *Cf.* Dollot, R., *op. cit.*, pp. 12 *ff.*; Redslob, *op. cit.*, p. 228; Littell, *op. cit.*, pp. 36–7; Sherman, *loc. cit.*, at p. 228; Roussel le Roy, *op. cit.*, pp. 64n–65n.

[11] For the text of the preliminary treaty of London, October 1, 1801, *cf.* Clercq, A. J. de, *Recueil des Traités de la France*, I, 464.

[12] Art. 92 of the Final Act of the Congress of Vienna (Hertslet, Map of Europe by Treaty, I, 262, 370), and the Declaration of November 20, 1815 (British and Foreign State Papers, Vol. III, p. 360).

[13] Martens, F. de, *Recueil des Traités*, II, 327, 379; III, 24.

[14] Treaty of April 21–May 3, 1815 (Hertslet, I, 120, British and Foreign State Papers, Vol. 2, p. 74). This was revoked by the treaty of November 6, 1846 (Hertslet, II, 1061 *ff.*), on the ground that, *inter alia*, "by acts contrary to the tenor of the treaties, Cracow has on several occasions freed herself from the condition of strict neutrality imposed on her" and that "these acts have on several occasions led to the armed intervention of the 3 Powers."

[15] Declaration of March 20, 1815 (British and Foreign State Papers, Vol. 2, p. 142), and Act of November 20, 1815 (*idem*, Vol. 3, p. 360; Hertslet, I, 370).

Russia in the interests of the political system:[16] the Aaland Islands were "neutralized"[17] in the sense of being disarmed; the Black Sea[18] was neutralized to render Russian naval power nugatory,[19] and lastly Serbia,[20] torn from the protection of the Czar, was also virtually "neutralized" under the stipulations of the Peace of Paris, and kept in such a status till finally liberated by the Treaty of Berlin.[21] But even that settlement, which marked a redress of the European balance, "neutralized" both the Lower Danube[22] and Bulgaria,[23] placing upon the latter virtually the same restrictions as had in the preceding decades been imposed upon Serbia, and for precisely the same motives.

Following the Treaty of Berlin, the principle of neutralization was invoked

[16] Redslob, *op. cit.*, p. 386, points out that the equilibrative neutralizing principle was first applied (apparently in the interests of balanced naval activity in the Western Hemisphere) in the Clayton-Bulwer Treaty of 1850 to the proposed Isthmian Canal route; thereafter the same terminology was applied to canals, rivers, international lakes, straits, persons, steamboats, etc., most indiscriminately (Wicker, *op. cit.*, Chap. I). This nebulous use of terminology, when subjected to critical analysis, has resulted in the adoption of the term *inviolability*, when applied to personnel of Red Cross and relief agencies and their establishments, and in the use of the term *internationalization* for rivers and straits or canals placed under international control, while since the World War extensive application has been made of the term *demilitarized areas or zones* to territorial or maritime frontiers (usually reciprocally disarmed) or to strategic locations placed under specific disabilities or servitudes (Befriedung). This usage virtually restricts the term *neutralization* to a residual application to states. (*Cf.* Krauel, *Neutralität, neutralisation und Befriedung*, p. 48.)

[17] Art. 33, Treaty of Paris, March 30, 1856 (Hertslet, II, 1264), and convention of the same date (*ibid.*, II, 1272–3). The latter simply stipulated that the Aaland Islands should not be fortified and that no military or naval establishment should be maintained or created there, it being the wish of the contracting parties "to extend to the Baltic Sea the harmony so happily reëstablished between them in the East."

[18] Art. 11, Treaty of Paris, and Black Sea Convention of the same date (Hertslet, II, 1256, 1270–1). This simply declared that "the Black Sea is neutralized," but apart from setting a limit to naval vessels therein and stating that in consequence "the maintenance or establishment upon its coasts of military-maritime arsenals" had become "alike unnecessary and purposeless" and was hence prohibited, nothing was done to enforce the guarantee, which Russia promptly repudiated in 1871.

[19] The status of the Ionian Islands following 1863–4 merely involved a minor adjustment satisfactory to the claims of British naval power in the Mediterranean. The "guarantee" extended to them by Art. 5 of the Treaty of July 13, 1863, was merely that they should be comprised within the "Monarchial, Independent and Constitutional (Hellenic) State." (Hertslet, II, 1547.) *Cf.* note 5, *supra*.

[20] By Art. 29 of the Treaty of Paris (Hertslet, II, 1262), Serbia was virtually deprived of the war-making power, the power of garrisoning and policing the country being left in Turkish hands. In return for this it was provided, *inter alia*, that no external intervention into Serbia would be permitted without previous agreement between the Powers. *Cf.* also Roussel le Roy, *op. cit.*, p. 34.

[21] Protocol No. 19, Congress of Berlin, July 12, 1878 (Hertslet, IV, 2756).

[22] Protocol No. 11, Congress of Berlin, July 2, 1878 (Hertslet, IV, 2746).

[23] Protocol No. 14, Congress of Berlin, July 6, 1878 (Hertslet, IV, 2750). *Cf.* also Redslob, *op. cit.*, p. 484.

in only two instances, those of the Conventional Basin of the Congo[24] and the Samoan Islands.[25] Both applications were conditioned by the desire to prevent the acquisition of undue influence by any one Power in either Central Africa or the southern Pacific Ocean, and thus to produce a stalemate in the race for colonial possessions in either area. The idea of extension of the principle to other areas did not lack advocates thereafter, but as a matter of historic fact, no further experiments in neutralization occurred after 1889. The movement for neutralization, therefore, remained, despite the fervor of its advocates, an exclusively nineteenth century achievement in the annals of the law of nations.[26]

So long as the European balance remained undisturbed by any general upheaval, and the clashing interests of the rival alliances in Europe were reconciled through territorial partitions in other parts of the world, as in Africa, China and Persia, the areas neutralized remained at peace. But when the balance was upset by the outbreak of the World War, naturally the neutralized states and areas were among the first to suffer. The fundamen-

[24] By Art. 10 of the Berlin Act of February 26, 1885, the Powers signatory thereto declared that they, and other Powers acceding later, would "bind themselves to *respect* the neutrality of the territories or portions of territories belonging to the said countries, comprising the territorial waters, so long as the Powers which exercise or shall exercise rights of sovereignty or protectorate over these territories, using their option of proclaiming themselves neutral, shall fulfill the duties which neutrality requires." (Hertslet, Map of Africa by Treaty, II, 474.)

[25] By Art. 1 of the Treaty of Berlin of June 14, 1889 (Malloy, Treaties of the United States, Vol. II, p. 1577), it was declared that "the Islands of Samoa are neutral territory." No guarantee of either neutrality, or inviolability or independence was given, and the treaty was eventually terminated by the treaty of partition of December 2, 1899 (*ibid.*, II, 1596).

[26] Buell, R. L. (International Relations, p. 553), holds that neutralization has been extended to Honduras and Albania while "in addition Iceland has been neutralized by unilateral act." An examination into the provisions of Art. 3 of the Central American Peace Treaty of December 20, 1907 (Malloy, *Treaties of the United States*, II, 2393), reveals that "Taking into account the central geographical position of Honduras and the facilities which owing to this circumstance have made its territory most often the theater of Central American conflicts, Honduras declares from now on its absolute neutrality *in event of any conflict between the other republics*, and the latter, in their turn, *provided such neutrality be observed*, bind themselves to *respect* it, and in no case to violate the Honduranean territory." It will be noted that this was merely a voluntary declaration of policy by Honduras, and in no way implied an imposed status. It was no bar to Honduras' entry into the World War. Finally, it was accompanied by a distinct and separate territorial guarantee, which was in no wise made contingent upon Honduranean neutrality. The omission of this provision in the revised treaties of 1923 is mute evidence of the greater force of the guarantees provided by membership in the League of Nations. As regards Albania, the alleged neutralization by the declaration of November 9, 1921, is not borne out by any stipulation laid down or recognized by either the Conference of Ambassadors or the Council of the League of Nations. (*Cf.* Official Journal of the League of Nations, Second Year, pp. 1195 *ff.*) As regards Iceland, *cf.* note 32 *infra*, and also Art. 19 of the neutralizing Act of the Danish Riksdag, November 30, 1918 (British and Foreign State Papers, Vol. 111, p. 706) which states that "Iceland declares itself permanently neutral". *Cf.* (also Lundborg, *Die gegenwärtigen Staatenverbindungen*, p. 123).

tal postulates of the system of the balance of power not only made them pawns in the struggle of the rival groups of alliances, but endowed them with a high strategic value in the prosecution of the war. Thus almost without exception the neutralized areas the world over were violated. The instances of Belgium and Luxemburg are usually pointed out with celerity, while the cases of Corfu and the Congo are slurred over by apologists for the Allied Powers, and the violation of the "neutralized" Straits of Magellan and the Suez Canal receives little attention. The significant fact revealed by a study of the effect of the war on any of the neutralized areas is that the purported inviolability which was popularly deemed to accrue to them in virtue of their neutral character proved utterly illusory in practice. The controversial literature regarding the political justification for such violations is, in retrospect, only illustrative of the tenuousness of the guarantees underlying neutralization.

Despite the apparent failure of the various treaties to safeguard the well-being of the areas neutralized by them, proposals were not lacking during the course of the World War for further neutralizations. Such, on the one hand, were the projects for the partial or general neutralization of the seas, which emanated from neutral and German sources[27] at the very time when the apologists for the violation of Belgium were busy. On the other hand, the various border states, flung off from the Russian body politic into a world at war by the centrifugal forces of revolution, plead, in their initial contacts with the great Powers, for recognition as neutrals, and as neutrals desirous of having that status guaranteed to them by international convention.[28]

[27] *Cf.* the project of the *Museo Social Argentino* for the neutralization of the seas off the American continents (*El Aislamiento Pacífico de América*, Buenos Aires, April, 1916), and the projects for wholesale neutralization of the seas in Babson, Roger W., The Future of World Peace, and Angell, Norman, The World's Highway (1915). For the views of Bernhard Dernburg and others, *cf.* Current History, Vol. 2, pp. 279–281, and Hershey, A. S., "The German Conception of the Freedom of the Seas," this JOURNAL, Vol. 13, pp. 207–226. It should be noted that Professor Hershey virtually identifies neutralization with internationalization, in much the same way as others have erroneously assumed that internationalized rivers were neutralized. *Cf.* also note 16, *supra*.

[28] Thus Esthonia, during 1918 and 1919 set forth a demand for an international guarantee of her neutrality or of her independence (*cf. Mémoire sur l'Indépendance de l'Esthonie*, presented to the Peace Conference in 1919, pp. 26, 46, 49, and the diplomatic brochure *Pour l'Esthonie*, Copenhagen, 1918, pp. 8, 11, 15, 18) and secured in advance from the Ukraine and Soviet Russia recognition of any eventual neutralization (League of Nations, Treaty Series, Vol. II, pp. 57, 124, 131, 136. But Esthonia made no special plea for an exceptional status within the League of Nations, as did Switzerland, when applying for membership, as she realized that "the policy of neutrality was no longer a practical necessity, as the League of Nations was intended to guarantee the integrity of all nations" and apparently offered better prospects. The same thesis appears in Latvian diplomatic correspondence throughout 1918 (*cf. La Revue Baltique*, No. 1, p. 60), but is entirely absent from documents presented to the Peace Conference, showing that at a relatively early date Latvian diplomatic agents had come to realize the incompatibility of perpetual neutrality with formal sanctions under a League of Nations.

For each of these phenomena there is a simple enough reason. The advocates of the neutralization of the seas were either neutrals themselves, and thus desirous of extending impartially to all the benefits of a nebulous "freedom of the seas" or else saw, as did many German writers on maritime war, that neutralization was the "logical consequence" of a balance of power at sea, and was the surest way whereby a nation defeated navally might render her victorious enemies impotent. The anxious border states, in grasping for some semblance of security whereby to prevent the imminent devastation of war and hostile occupation, looked to the only generally known pre-war form of assurance of peaceful development, and sought neutralization, confessing themselves impotent to hold their own as against either the Russian or German armies. Nevertheless, international assistance was not forthcoming in the midst of war, and the projects of land neutralization were hardly welcomed by the Allied Powers after the experience of Belgium. The Central Powers preferred to speak of "protectorates." Thus the last large-scale advocacy of neutralization, during the World War, was barren of results.

Following the armistices of 1918, the complete collapse of the Central Empires and the virtual elimination of Russia from European counsels, the last semblance of the balance of power was gone, and in its place the ideal of an organized concert, expressing international solidarity, came rapidly to the fore, presently taking the form of the organization of the League of Nations. But quite apart from the legal consequences of this change in the basic structure of international society, and of the social guarantees mutually and reciprocally afforded thereby, the final treaties of peace, recognizing that the neutralization arrangements no longer conformed to the requirements of the international situation, extinguished the régime of neutralization in Belgium, Moresnet, Luxemburg and Savoy, while divesting the Congo of its neutrality.[29] In addition, the status of the Danube[30] and the Straits[31] under

[29] *Cf.* note 7, *supra*. On the question of Luxemburg's status, *cf.* Wehrer, Albert, "Le Statut du Luxembourg et la Société des Nations," *Revue Générale de Droit International Public*, Série II, Tome VI (1924) p. 179 *ff.*, and Borsi, V., "La neutralizzazione del Lussemburgo e la sua ammissione nella Societa delle Nazione," *Rivista di Diritto Internazionale*, 1925, pp. 3–17. The latter account questions whether Luxemburg's neutralization has actually ceased, inasmuch as the Grand Ducal constitution, which confirmed the neutralization as a part of the fundamental law, has not been modified. Such a view is based on a misconception of the legally contractual nature of the neutralization process evidenced in the Treaties of Versailles and Saint Germain, and would imply that the neutralization was a unilateral act of Luxemburg itself.

[30] *Cf.* Treaty of Saint Germain, Articles 301–308.

[31] *Cf.* the Straits Convention of July 24, 1923, and Art. 23 of the Treaty of Lausanne, of the same date, Supplement to this JOURNAL, Vol. 18, pp. 11, 53–67. *Cf.*, also, De Visscher, F., "Le régime nouveau des Détroits," *Revue de Droit International et de Législation Comparée*, Vol. 51, pp. 13–57 (1924). The author denies the Straits were given "un statut juridique de neutralité," described it as a "neutralisation locale" and adds: "Nous croyons superflu d'insister ici sur les différences fondamentales qui séparent la neutralisation locale, appellée

the final settlement was divorced from all connotation of neutrality. Recognizing that the circumstances initiating these peculiar conventional agreements had changed, the great Powers determined to undo neutralization altogether and left free to the states previously affected by such arrangements the finding of new bases for their security, and new formulas for its guarantee. Such is the general situation in which neutralization, as an international practice, is left as a result of the World War; such, as a concomitant of the balance of power, has been its rôle thus far.

It is of interest, in the light of this survey of the instances in which the principle of neutralization had been applied, to analyze more carefully the elements entering into it, for the loose use of terminology in regard to conventional neutrality has led to no little difficulty in scientifically distinguishing the factors involved. The terms "perpetual neutrality," "permanent neutrality" and "neutralization" have been frequently used interchangeably with little regard for either accuracy or facts. For the purposes of this discussion the first term will be utilized as embracing both of the remaining terms, each of which is, however, differentiated from the other. Thus "perpetual neutrality" may be conceived of as applicable in two senses: (1) as a *permanent*, but voluntarily adopted *policy*, and (2) as an *imposed and irrevocable* conventional *status*.

Instances of its use in the first sense may be found in relation to the policy of the Scandinavian states and Holland, with whom political and military neutrality had avowedly become, before 1914, a permanent policy upon the maintenance of which other nations could count in advance. So permanent, indeed, was the policy that not a few of the zealots of the neutralization movement claimed that "self-neutralization" could be effected by the unilateral affirmation by any state of its desire to pursue unequivocal neutrality in all future contingencies.[32] By such a notification to all countries, neutralization, it was held, would become immediately operative, the dangers of future war would be dissipated and the millennium of perpetual peace immediately inaugurated. It is hardly necessary to point out the fact that such a gratuitous declaration would have no contractual significance. It would possess merely the moral value of a political pronouncement, not necessarily binding upon a future governmental administration within the country, still less upon the outside world. Hence the concept of self-neutralization, like

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aussi par les allemands Befriedung, de la neutralisation d'un Etat. La première laisse intacte la liberté de l'Etat souverain de recourir à la guerre; la seconde enleve à un Etat le droit de guerre, sauve pour sa propre défense" (pp. 37n–38n).

[32] Such, for example, was the project proposed by the Russian publicist, F. de Martens, for Denmark ("La neutralisation du Danemark," *Revue des Deux Mondes*, 5e série, XVIII, 1903), in order to form a barrier of self-neutralized states from Belgian to the North Cape. While Denmark did not take up the idea in that form, she did endeavor, by unilateral act, to neutralize Iceland in 1918, at the same time that the new-born Baltic States were seeking neutralization. (See also note 26, *supra*.) But such an act, in the words of an eminent American authority, "can scarcely be said to be recognized."

its modern kinsman, the concept of the outlawry of war by unilateral declaration, must be ruled out of discussion as possessing no international validity whatsoever.[33] But neutrality as a permanent policy, capable of enforcement by municipal legislation, possessed a well-recognized foundation in the pre-war world, and was regarded as a voluntarily assumed position which, although ostensibly permanent as a policy, could be abandoned at discretion without thereby arousing international complications or giving cause for offense to any state.

Quite other was the imposed status which is, properly speaking, neutralization, derived from an international convention, made definitely and irrevocably binding, at least in principle, upon the state placed under such a régime by the joint action of the Powers. Irrespective of the specific form of the treaty of neutralization or of the incidental accompanying features by way of strictures or servitudes on the neutralized area or state, two salient things were noticeable, first, that the status was *imposed*, *i.e.*, was forced upon the state regardless of its consent, and second, that the status was *irrevocable* without the consent of the contracting Powers. For the neutralized state no other policy than enforced neutrality was legally possible, and departure from this status, the exercise of the war-making power, might subject the neutralized state to the severest punishment at the hands of the great powers. In return for this stricture on territorial sovereignty, a guarantee of the

[33] The movement for self-neutralization is critically discussed by Professor George Grafton Wilson in "Neutralization in Theory and Practice," Yale Review, Vol. IV, pp. 474–486, at pp. 482–5. Noting that the whole neutralization movement appears to have been based on the assumption "that the simple creation of the status assured in some unexpected way a respect for the neutralized entity which could not be gained under any other name," and that "there has been an expectation that treaties of neutralization, *whether or not accompanied by a guarantee* (italics mine), would be more strictly observed than other international agreements," he shows how the movement for unilateral self-neutralization fell, in pre-war days, into the hands of irenic propagandists. At this point the doctrine was taken up by the Interparliamentary Union, which sought to remove most of the objections to the unilateral character of self-neutralization by providing for a general international convention of neutralization to which any countries anxious to neutralize themselves could be invited to adhere. The blanket notification *urbi et orbi* of self-neutralization would thus, under the terms of the proposed convention, become in reality a procedural formality—the notification of accession to a neutralization convention. Signatories to such a convention were to be bound to refrain from acts against the neutrality of a neutralized state, and in case of the violation of any self-neutralized state were to "act together to take means to give the neutralized state satisfaction," such action being taken through the Bureau of the Permanent Court of Arbitration at The Hague. (*Cf. Annuaire de l'Union Interparlementaire*, 1913, pp. 111–113.) It is believed that the type of guarantee sought under such a proposal was not, in reality, a guarantee of neutrality, and the concerted action behind it would have been directly violative of the essence of neutrality. It is interesting to note, however, that the project was based upon two fundamental, underlying, but unexpressed conceptions: (1) the assumption by the self-neutralizing state of obligations not to go to war, and (2) the essential solidarity of all signatory states, both of which principles later became cornerstones of the League of Nations. But both principles were distinctly at variance with the code that governed the pre-war world.

neutrality, or of the "principle of neutrality" was usually, though not invariably given, and various other commitments were undertaken by the respective contracting parties.

It should be noted, however, that the guarantees to *respect* neutrality or to *cause it to be respected* were not tantamount to a territorial guarantee, and that whenever it appeared desirable, the additional and specific territorial guarantee was explicitly and separately given. Thus it is of the utmost importance to note that the idea of neutralization does not of itself connote a territorial guarantee. If neutralization arrangements can exist without territorial guarantee and territorial guarantees without neutralization, then obviously territorial guarantee is not a necessary and inherent part or factor in neutralizations. Thus, the London treaties of 1867 gave to Luxemburg only the guarantee of the principle of neutrality[34] and not the guarantee of its territory. The same is true also of the agreements for the neutralization of the Congo.[35] On the other hand, the Vienna treaties and the guarantees of the great Powers as regards Switzerland specified not only a recognition of her policy of permanent neutrality, but *in addition* furnished a territorial guarantee.[36]

[34] The lack of any guarantee in the British treaty draft led to strong objections from Prussia, Austria, France, the Netherlands and Russia. "They all felt," writes an American scholar, "that Luxemburg must be placed under a European guarantee. The Prussian representative saw a very marked difference between the guarantee of territorial integrity and that of neutralization. . . . The proposed treaty, as it stood, had no general clause of guarantee for all of it, hence the principle of neutralization was merely recognized." *Cf.* Caton, C., The Neutralization of Belgium, Chap. III, Sec. 2., Leland Stanford Junior University Thesis MSS., 1915. See also Sherman, G. E., *loc. cit.*, at p. 233: " . . . in Switzerland the neutralization of the country was at the Congress of Vienna expressly recognized by the great Powers of Europe while its territorial integrity and inviolability were guaranteed; in the case of Belgium . . . it is the neutrality and independence of the country that fall within the international guarantee: for Luxemburg . . . there is an international guarantee of neutrality alone." Finally, Ion, T. P. ("Treaties of Neutrality," Michigan Law Review, Vol. XIII, at p. 383), quotes the Earl of Derby as stating that "the guarantee of the possession of Luxemburg to the King of Holland was a joint and several guarantee similar to that which was given with regard to the independence and neutrality of Belgium; it was binding individually and separately upon each of the Powers. That was the nature of guarantee which was given with regard to Belgium and with regard to the possession of Luxemburg by the Duke-King. Now a guarantee of neutrality is very different from a guarantee of possession . . . but as it is, . . . the guarantee is only collective, *i.e.*, it is binding only upon all the Powers in their collective capacity. They all guarantee to maintain the neutrality of Luxemburg, but not one of the Powers is bound to fulfill that guarantee alone." (Hansard, CLXXXVIII, 146.)

[35] By Art. 10 of the Berlin Act of February 26, 1885, "the High Signatory Parties to the present Act, and those who shall hereafter adopt it, bind themselves to *respect* the neutrality of territories or portions of territories belonging to the said countries, . . . so long as the Powers shall fulfill the duties which neutrality requires." (Hertslet, Map of Africa by Treaty, II, 475.)

[36] *Cf.* Redslob, *op. cit.*, 343; Sherman, *loc. cit.*, at 222 *ff.*; Littell, *op. cit.*, 27–35; Baumgartner, Queen's Quarterly, No. 25, pp. 54–89, at 66 and 88, and Annexe III, 12 c, of the *Message du Conseil Fédéral à l'Assemblée Fédérale concernant la question de l'accession de la*

A large number of territorial guarantee treaties came into being during the nineteenth century,[37] but only a very few of these coincided with the application of neutralization. A clear perception of the relations of the treaties of territorial guarantee to those guaranteeing or recognizing neutrality is therefore of vital importance to an appreciation of the whole neutralization movement. To distinguish between them it is necessary to note only the fact that the treaties of territorial guarantee neither place restrictions on the war-making power of the country nor prohibit the state concerned from entering into political alliances, both of which limitations are definitely connected with instances of neutralization. From the general standpoint of either international or constitutional law, the territorial guarantee does not in itself impose limitations upon the internal or external sovereignty of a state, while it is generally accepted that neutralization does.[38] Indeed, this fact was the principal source of criticism of the neutralization movement before the World War.

Suisse à la Société des Nations, pp. 346–347, for the authentic text of the Act of November 20, 1815. Its essential portions state that "les Puissances Signataires de la Déclaration de Vienne du vingt mars font, par le présent acte, une *reconnaissance* formelle et authentique *de la neutralité perpétuelle de la Suisse*, et Elles lui garantissent *l'intégrité et l'inviolabilité de son territoire* dans ses nouvelles limites. . . . Les Puissances reconnaissent et garantissent également la neutralité des parties de la Savoie, désignées par l'acte du Congres de Vienne du 29 mars mil huit cent quinze, et par le traité de Paris de ce jour, comme devant jouir de la neutralité de la Suisse de la même manière que si elles appartenaient à celle-ci." It will be noted that no territorial guarantee was extended to Savoy. The Swiss constitutional lawyers have always maintained the distinction between the territorial guarantee and the recognition of their neutrality as a permanent, but voluntarily adopted national policy. Hence in the elaboration of the League of Nations Covenant and the Treaty of Versailles, Switzerland asked for and obtained, under their terms, a re-recognition of the November guarantee of 1815, such a stipulation being regarded as a "regional understanding for securing the maintenance of peace" under Article 21 of the Covenant, and as "guarantees constituting international obligations for the maintenance of peace" under Article 435 of the treaty. *Cf.* also Rougier, Antoine, "Le Traité de Versailles et la neutralité de la Savoie," *Revue Générale de Droit International Public*, 2e série, tome II, pp. 49 *ff.* (1920).

[37] Examples may be noted in the various territorial settlements of Balkan questions, such as the Treaties of Paris (1856) and Berlin (1878) by which the great Powers confirmed the territorial clauses and set themselves up as guarantors of execution. *Cf.*, also Art. 1 of the Treaty of November 18, 1903, by which "the United States guarantees and will maintain the independence of the Republic of Panama" (Malloy, Treaties of the United States, II, 1348). An excellent example of a territorial guarantee not involving any idea of neutrality is seen in the treaty of May 1, 1865 between Argentina, Brazil and Uruguay, guaranteeing "the independence, the sovereignty, and the territorial integrity of Paraguay." (*Cf.* British and Foreign State Papers, Vol. 68, p. 463.)

[38] Redslob (*op. cit.*, pp. 35–6), regards neutralization as consensual inequality on a par with the capitulations and as "a serious restriction of liberty" (p. 380); Baumgartner (*loc. cit.*, pp. 23 *ff.*), concludes that it "divides states as to autonomy and sovereignty into two essentially different classes, which is inconsistent with the nature, aim and function of the state in human society," and that states existing or arising of themselves are weakened internally by neutralization. Kleen (*op. cit.*, I, 95 *ff.*), is the extreme upholder of this view. Writing after the war, Roussel le Roy is likewise very insistent on these limitations (Chaps. I, IV), and on their rescission.

Having noted the distinction between the guarantee of neutrality and that of territorial integrity, it is possible to confine the discussion of sanctions behind these guarantees to those behind that of neutrality alone. The guarantees of this nature have traditionally been classified as relates (1) to the extent of the obligation and (2) to the modalities for its enforcement. Those of the first kind have usually been classified, according to the expressions used in the treaties embodying them, as "*respecter*" and "*faire respecter*" guarantees, the former being termed a "*garantie restreinte*" as contrasted with the latter fuller term. The obligations imposed by the former have been those of self-restraint on the part of the guarantor powers; those under the latter, have imposed the wider obligation to exercise constraint upon violators of the neutrality guaranteed. As to the methodology of guarantee, treaty provisions have usually stipulated either a "joint-and-several" pledge or a "collective" one, the former placing upon all signatories individually the obligation to make good their word, while the latter has been so loosely interpreted as to provide for little more than an assurance of moral support to the country neutralized.

Thus viewed, (1) the collective guarantee merely to respect the principle of neutrality is so weak as to be meaningless, as was proved by the instances of Luxemburg and the Congo during the World War. (2) A collective guarantee to cause neutrality to be respected is somewhat stronger, and would probably be workable if some Power other than a signatory should attempt the violation of the neutrality of the area in question, though in actual fact such a guarantee is not likely to be invoked against a signatory who violates it. (3) A joint-and-several guarantee to respect is of no more significance than the cumulative self-restraint of the guarantors, but (4) the joint-and-several guarantee to cause to be respected involves, in strict theory, effective sanctions. A guarantee of this character leaves the individual guarantor no option but to act, irrespective of the action taken by other cosignatories. In fact, however, this type of guarantee is almost invariably associated with a stringent territorial guarantee which would in itself involve armed assistance to the attacked state. The only effective test of such a guarantee of neutrality would appear to occur in the absence of the territorial guarantee.[39]

[39] It has been alleged that Belgium furnished, under the treaties of 1839, just such an instance of this type of guarantee. But an examination of the documentary sources concerning the neutralization of Belgium hardly confirms this view. The first neutralization proposals of January 20, 1831, made by Talleyrand, prescribed in Article V that Belgium, as territorially described, should form a permanently neutral state. "The Five Powers shall guarantee this permanent neutrality, *as well as the integrity and inviolability of its territory*, within the limits mentioned above." According to Article VI, "By a joint reciprocity, Belgium shall be bound to observe this same neutrality towards all other states, and to disturb in no way their internal or external integrity." (Talleyrand, *Mémoirs*, tome IV, 15 n.; and Protocols of the Conference of London relative to the Affairs of Belgium, 1830–1832, p. 34 cited by Littell, *op, cit.*, p. 41.) In this way Talleyrand managed to embody in Articles IX and X of the

From an examination of the type of the guarantees behind the various treaties of neutralization two facts are outstanding: In the first place, no effective sanctions lie behind any but the last type. In the second place, effective sanctions presuppose a general willingness of a large number of Powers to lend their joint and several aid to a neutralized state. For practical effectiveness the guarantee demands international solidarity, whereas the balance of power theory—the very negation of solidarity—formed the dogma of the whole nineteenth century. Finally, it is to be noted that in all cases of effective sanctions there has been, directly or by implication, a distinct territorial guarantee, whereas, irrespective of the terms of the guarantee, or the modalities for its execution, no mere guarantee of neutrality has ever been effective when put to the test. Thus, if viewed only from the standpoint of practical efficiency, treaties of neutralization, guaranteeing merely the neutrality of a country and not its territory, have been weighed in the balances of international experience and found wanting. That in itself would suffice to account for the termination of the various treaties of neutralization at the end of the World War. On the other hand, little if any complaint has arisen from the application of treaties of territorial guarantee. If the World War served no other purpose for international law, it did effectively make clear the difference in value between the guarantee of national possession and that of neutral status.

It is, however, when viewed from the standpoint of the entire international state system that the neutralization movement assumes a new aspect at the end of the World War. The avowed application of the principle of neutralization in the interests of the system of the balance of power inevitably raises

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treaty of June 26, 1831, a specific territorial guarantee to Belgium and to place Belgium's acknowledged neutrality on a parity with that of Switzerland. ("La neutralité reconnue de la Belgique place désormais ce pays dans le même position que la Suisse." Talleyrand, *Mémoirs*, tome IV, pp. 19, 38.) But the problem arises of "explaining how this guarantee of the inviolability of Belgian territory which figures in the treaty of the Eighteen Articles of June 26, 1831, is not found in the treaty of 1839. Must it be said that the Powers designedly discarded the mention of inviolability?" (Roussel le Roy, *op. cit.*, p. 111.) In the opinion of Merignhac and Lemonon (*Le Droit des Gens et la Guerre de 1914–1918*, tome II, p. 321), if the definitive texts had effected so radical a change, some traces of the discussion would be available in the record of the diplomatic negotiations, but these are silent. They conclude that the terms of the preliminaries had had to specify in detail all the consequences of neutrality while the guarantee clause of the final treaty, being of a general character, did not have to mention the special objects of the guarantee. Thus, observes Roussel le Roy, "there can be no contradiction between the preliminary treaty and the definitive one. *The clause of territorial inviolability expressly formulated in the first subsists implicity in the second.*" (*Op. cit.*, 112.) The doctrine of implicit subsistence is corroborated by the attitude of the Belgian Government in 1914 in appealing to England, France and Russia to coöperate as guarantors, in the defence of Belgian territory. It requested "concerted and common action" to resist Germany's violation of Belgian neutrality, "and at the same time to guarantee the maintenance of the independence *and of the integrity* of Belgium in the future." (Belgian Gray Book, No. 40, August 4, 1914.)

the question of the status of the movement in the event of a fundamental modification of the state system. If, from a theoretical standpoint, the system of the balance of power were to disappear, it might appear a not unjustifiable inference that the *raison d'être* of neutralization would be gone and that a revamping of the régime of neutralized regions would ensue. This is believed to be exactly the result produced by the World War. The reconstruction of the European state system in connection with the concerted effort made at the Peace Conference of Paris in 1919 to provide a mechanism for the solidary organization of an all-inclusive international society raised the question as to whether the movements for neutralization and for international organization on a societarian basis can co-exist.

The answer is believed to be found in the constitutional principles embodied in the League of Nations Covenant and in their "logical consequences." The very creation of a Society of Nations destined by its basic charter and prime purpose to set up general procedural restrictions against resort to war would in itself have fundamentally affected the neutralization movement. But what influenced it even more was the successful assault made in the Covenant on the concept of neutrality. Under its terms, and for members of the League, volitional neutrality is reduced almost to insignificance; only in restricted circumstances is it optional or possible; in certain specific instances it is theoretically excluded. But if this be the situation for states without servitudes, what about those placed under conventional, enforced neutrality? Obviously that status is incompatible with the obligations incurred by members of the League.[40] Thus for Belgium and Luxemburg the abandonment of the political régime under which they had been placed was, from both a theoretical and practical standpoint, an essential prerequisite to their participation in the new structure created for the maintenance of peace. For Switzerland, the creation of the League brought no less obvious difficulties. Here, however, the clear thought of the Swiss constitutional lawyers and historians was at last vindicated. The reaffirmation of the territorial guarantees of 1815 was seen at Paris to be thoroughly in consonance with the stipulations of the Covenant as regards territorial integrity, while the re-recognition of Switzerland's established national policy of permanent neutrality as a "regional understanding for securing the maintenance of peace" formed an additional guarantee of her existing political status. In addition, the difficult point as to coöperation in material sanctions decreed by the League was settled by Switzerland's assurance of her willingness to pursue on occasion a policy of differential economic neutrality, "benevolent" in its nature, towards Covenant-defenders in their solidary action against

[40] Of this situation Professor Rafael Erich writes: "Il convient d'abord de constater que d'après des principes dominants de la Société des Nations, le régime de neutralisation, antérieurement pratique avec un succès assez problematique, doit être considéré comme très peu applicable, sinon comme tout a fait exclu." *Revue de Droit International et de Législation Comparée*, Vol. 52, p. 349 (1925).

Covenant-breakers. Thus Swiss neutrality, as a permanent policy, was brought into keeping with the spirit and letter of the Covenant.[41]

In view of the disappearance of all neutralized states and the elimination of almost all neutralized areas by the terms of the peace treaties, neutralization, as a system of conventional guarantees against war or the spread of war, would appear to be distinctly on the wane, if not on the high road to extinction. It is obvious that the likelihood of reneutralization of states is extremely small. The inchoate conditions of international society which permitted neutralization as a temporary expedient, a specific stabilizer of the addled balance of power, exist no more; the structure of international society has been profoundly altered in a sense which precludes, *a priori*, the application of a régime of enforced neutrality to any members of the League. It would appear that as a matter of historic fact, the idea of neutralization had been abandoned for the more substantial guarantees offered by a well-nigh all-inclusive organization. These are the guarantees at law of territorial integrity and political independence, two elements that comprise the *sine qua non* of national and international security. Because the unilateral restrictions of a régime of neutralization have become omnilateral, because, in lieu of military neutrality, territorial integrity is guaranteed, a new situation has been produced under the reorganized Society of Nations. The material guarantees it offers are genuine, definite, concrete, not vague consecrations of a principle at cross-purposes with the impulses of national pride and the exigencies of national security. So, too, the guarantees formulated at Locarno, and others that are being sought today to bring peace and security to Europe, are mutual, not one-sided; they are based upon the unrestricted guarantee of national possession, and not upon an imposed, differential status of abnegation. They are being sought among equals who pre-posit the solidarity of all members of a common society, the obligatory collective enforcement of sanctions and the necessity of general disarmament in lieu of partial, motivated and servitudinous demilitarization.

Thus it appears altogether likely that neutralization, which a learned British writer once characterized as always a minor current in international law,[42] will tend to disappear altogether, and to be replaced by a régime more suited to the structure of a Society of Nations, by social guarantees of a more effective character. It is in such pacts as that of Locarno, in the principles of tangible territorial guarantee, backed by the collective force of all, applicable, if need be, against any, that the political security of nations is being sought today, rather than in the nebulous and dubious protection of a sonorous phrase descriptive of an outworn stage in the evolution of international society.

[41] *Cf.* the *Message du Conseil Fédéral*, etc., of August 4, 1919, previously cited, esp. pp. 26–49 and 228–237, and the *Message Complémentaire* (Ad 1119) of February 17, 1920, pp. 5–11.

[42] Oppenheim, L., International Law (3d ed., 1920), Sec. 99.

EDITORIAL COMMENT

THE BRITISH COMMONWEALTH OF NATIONS

For centuries there was an England, to which Wales was added by conquest; and after several centuries, England and Scotland agreed to enter into a political union, to be known as the United Kingdom of Great Britain. Still later, Ireland was added, to form the United Kingdom of Great Britain and Ireland. And in the memory of people still living, the Indian territories were formed into an empire, of which Victoria, the late Queen of the British possessions, was declared Empress. During much of this time England, and then Great Britain, was adding colonies in all parts of the world, some of which, being peopled from the home countries, acquired local self-government and became known as the dominions beyond the seas. The result was an empire in fact if not in form, composed of autonomous States. In the opinion of the government of each of the States, the time had come to put into writing the relation of the States to each other and to the larger and undefined body of which they are integral parts. This they have done, and the British Commonwealth of Nations has come into being.

The report of the Committee on Inter-Imperial Relations of the Imperial Conference was approved by the latter body on November 19th of the present year. It defines, at least for the present, the status, not only of the dominions, but of Great Britain as well. The members of the Committee on Inter-Imperial Relations included, in addition to Lord Balfour, the Prime Ministers of the five self-governing dominions, the Vice-President of the Executive Council of the Irish Free State, the Secretary of State for India, the Secretaries of State for Foreign Affairs and Dominion Affairs. A committee thus composed was indeed authorized to speak for the British Empire.

The Imperial Conference, under varying designations, has had predecessors. The gatherings of 1887, 1897 and 1902 were known as Colonial Conferences; those of 1907 and 1911, as Imperial Conferences; those of 1917 and 1918 as Imperial War Conferences; the assembly of 1921 as the Premiers' Conference, and those of 1923 and 1926 as Imperial Conferences. The last was the tenth of the series; therefore the report of the Committee on Inter-Imperial Relations was not hastily drawn. Each of the preceding conferences had contributed of its experience and wisdom, so that the report of 1926 was in large measure but a formal statement of existing relations between the self-governing communities of the British Empire.

But the report has a longer ancestry, even antedating the 4th of July 1776, when government by consent of the governed made its appearance, the men of that day little thinking that that principle would become the cornerstone of British colonial policy. An American historian, Professor Andrew C. McLaughlin, who has devoted much attention to the subject, says in a recent

volume on America and Britain, that, "the American theory of federalism is stated with . . . amazing accuracy in an answer to Doctor Johnson's *Taxation No Tyranny.*" Both are of 1775. From the answer a few phrases may be quoted: "From the state of the *British* Empire, composed of extensive and dispersed Dominions, and from the nature of its Government, a multiplicity of Legislatures, or of Assemblies claiming to be so, have arisen in one Empire. It is in some degree," the anonymous author of the answer continues, "a new case in legislation, and must be governed therefore more by its own circumstances, and by the genius of our peculiar Constitution, than by abstract notions of Government at large." What were the circumstances? "Every Colony, in fact, has two Legislatures, one interiour and Provincial, viz: the Colonial Assembly; the other exteriour and imperial, viz: the *British* Parliament." What was the effect of the existence of the one and the other? "Neither will the unity of the Empire be in danger from the Provincial Legislature being thus exclusive as to points. It is perfectly sufficient, if the *British* Legislature be supreme as to all those things which are essential to *Great Britain's* being substantially the head of the Empire; a line not very difficult to be drawn, . . . Neither is there any absurdity in there being two Assemblies, each one of them sufficient, or, if you will, supreme, as to objects perfectly distinct; for this plain reason, that the objects being perfectly distinct, they cannot clash." The conclusion which the anonymous writer drew from the existence of an Imperial Parliament for imperial purposes, and Local Legislatures for local purposes would have maintained the headship of the Parliament for general purposes of the Empire as does the Congress of the United States for the general purposes of the Federal Union; and Colonial Assemblies for the local purposes of the colonies as is the case of our State Legislatures for the States of the American Union. "The Colonist, therefore, allowing that the supreme power or Legislature, where there is but one, . . . will say that with respect to him, there are two, and that the Provincial Legislature s the supreme power as to taxation for his Colony."

If the mother country and the colonies could have brought about such an arrangement, it is doubtful whether then or thereafter, the English-speaking peoples would have been separated. The problem was new, however; the mother country was unwilling to cede rights for which there was no precedent, and the erstwhile colonies, when left to themselves, were unable to form at a single trial, that union of sovereign and independent States under "a superintending head" which we call the United States of America. It may be said, however, that the success of the American experiment has furnished the precedent which was lacking for a British Commonwealth of Nations. The revolt of the American colonies and the likelihood which had become a certainty, that France would intervene in their behalf, caused the Parliament to pass the Taxation of Colonies Act of 1778 (18 Geo. III, c. 12). It was too late to save the colonies in revolt, but it saved the future colonies from revolt. The Act provided in its first section that Parliament, "will not

impose any duty, tax, or assessment whatever, payable in any of his Majesty's colonies, provinces, and plantations in North America or the West Indies; except only such duties as it may be expedient to impose for the regulation of commerce; the net produce of such duties to be always paid and applied to and for the use of the colony, province, or plantation, in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective general courts, or general assemblies, of such colonies, provinces, or plantations, are ordinarily paid and applied."

But even before the outbreak of the American Revolution, Great Britain had organized Canada in such a way that the French settlers were so satisfied with the government of Great Britain that they refused to join with the colonies to the south in a declaration of independence from Great Britain (for to the French, "mother country" would have been inapplicable in this connection). The good statesmanship, which saved Canada, and which was to create a national spirit in Canada, preventing absorption by the English-speaking country to the South, assured to His Britannic Majesty's French subjects their language, their Church, and their institutions. One by one, the colonies were accorded self-government with ministerial responsibility: Ontario (1839), Quebec (1839), Nova Scotia (1848), New Brunswick (1848), Prince Edward Island (1851), Victoria (1855), New South Wales (1855), Tasmania (1855), South Australia (1855), New Zealand (1856), Queensland (1859), Manitoba (1870), British Columbia (1871), Cape Colony (1872), West Australia (1890), Natal (1893), Saskatchewan (1905), Alberta (1905), Transvaal (1906), Orange Free State (1907). In each case, this was regarded as a great boon, but it was not all. There was to be a federation of most of the self-governing colonies, and the federated colonies were to become shortly thereafter, autonomous States of the British Commonwealth. In 1867, the Dominion of Canada was formed of the five Provinces then existing in continental Canada, and four other Provinces have been created from its territory, and added from time to time to the Dominion. In 1900 the Australian Colonies were federated, forming the Commonwealth of Australia; and in 1909 a greater triumph was achieved, indeed one of the greatest in the history of Great Britain, in the formation of the South African Union, composed of Cape Town and Natal and the former Boer Republics of Transvaal and the Orange Free State.

The self-governing Dominions already existed in fact, although not in name, as appears from the treaty of April 4, 1908, between Great Britain and the United States, in which His Majesty's Government reserved "the right before concluding a special agreement in any matter affecting the interests of a self-governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion." A few years later, in the British Nationality and Status of Aliens Act of 1914, (4 and 5 George V, cap. 17), the Dominions were specified by name: "The Dominion of Canada, the Commonwealth of Australia (including for the purposes of this Act the terri-

tory of Papua and Norfolk Island), The Dominion of New Zealand, The Union of South Africa, Newfoundland."

Mr. Asquith, then Prime Minister, made some observations of an illuminating nature in his opening address as President of the Imperial Conference of 1911. Two solutions had been proposed, he said, for the settlement of colonial problems, "The one was centralization—the government, that is, except in relatively trivial matters, of all the outlying parts of the Empire from an office in Downing Street. The other was disintegration . . . by which, without the hazards or embitterments of coercion, each community, as it grew to political manhood, would follow the example of the American Colonies, and start an independent existence of its own." Neither of these theories commanded "the faintest support to-day, either at home or in any part of our self-governing Empire." "For," he added, "in proportion as centralization was seen to be increasingly absurd, so has disintegration been felt to be increasingly impossible." And he concluded this portion of his address with the statement that, "we each of us are, and we each of us intend to remain, master in our own household."[1]

In another portion of the address he said that the mere existence of this political organization "rules out the possibility of war between populations numbering something like a third of the human race"—a statement which every friend of international peace should ponder. He referred to two things possessed by the self-governing British Dominions as unique in the history of great political aggregations: the first, the reign of law; the second, "the combination of local autonomy—absolute, unfettered, complete—with loyalty to a common head, co-operation, spontaneous and unforced, for common interests and purposes."[2]

In view of these solemn pronouncements, the members of the Committee on Inter-Imperial Relations of the Imperial Conference were justified in the feeling that the British Commonwealth of Nations already existed.

It will be observed that India is not included in the self-governing Dominions. Its position is separate and distinct, and its status regulated by the Government of India Act of 1919. It is not self-governing in the sense of a Dominion; it is an empire, of which the King of Great Britain is, for the time being, Emperor. However it may be said that whatever the internal government of India may be, externally it is considered an independent State, in the sense that it is a member of the League of Nations, and possesses the power of making treaties as do the Dominions.

There are many matters of moment in the report of the Committee on Inter-Imperial Relations; but minor matters must necessarily be slighted in an editorial comment. Only the relations of the self-governing Dominions to one another within the Empire, and their relations to the outside

[1] A. F. Dicey, Introduction to the Study of the Law of the Constitution (1915), xxxiv.

[2] Dicey, *op. cit.*, lxxxi, note.

world, especially in the exercise of the treaty-making power, can be considered.

The Imperial Conference felt that the time was at hand to state the position of the integral parts of the British Empire; indeed they said that "their position and mutual relations may be readily defined." The Imperial Conference thus defined them:

> *They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*[3]

A little later in the report, the Committee says, "Every self-governing member of the Empire is now the master of its destiny," and that "in fact, if not always in form, it is subject to no compulsion whatever." In a still later portion of the report dealing with the same matter, it is said: "every Dominion is now, and must always remain, the sole judge of the nature and extent of its coöperation."

From these declarations the conclusion would seem to be that the members of the British Commonwealth of Nations are autonomous States, independent of each other, just as in times past the United Kingdom of Great Britain and Ireland, of which George III was King, was separate and distinct from Hanover, of which George was likewise King; so that an act done by him in his British capacity did not affect Hanover any more than an act done by him in his Hanoverian capacity affected Great Britain and Ireland. Each was separate and distinct, and the union was what is known in international law as a personal union through a sovereign common to each.

In view of these things, a change is necessary in the royal title, and the committee proposes that it should hereafter be: "George V, by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India." It is to be observed that the United Kingdom of Great Britain and Ireland goes by the board, because Ireland is now a free State, and by its "treaty" with Great Britain it has assumed the status of the Dominion of Canada.

The result is that Great Britain appears to have lost its superintendence of the Empire. It is one of the self-governing communities; each has no direct, but only an indirect relation—to Canada, for example—through George V. The King resides in London and exercises his kingly functions in regard to Great Britain, but he needs a representative, called in India the Viceroy and in the other Dominions, the Governor General. The Viceroy or Governor General represents the Crown, and performs those functions which George V would perform in person if it were physically possible for him to be in the capital of each of his Dominions at one and the same time. The Parliament of Great Britain legislates for itself; the Parliament of Canada for the

[3] *The London Times*, November 22, 1926, p. 9.

Dominion of Canada. Each is master in its own house, and the legislature of neither extends to the jurisdiction of the other.

There will, of course, be need of much forbearance under this status, notably in the case of appeals, which hitherto lay from the judgments of the Dominions to the Judicial Committee of the Privy Council. Consultation and discussion will be needed, but it was stated in the report that "questions affecting judicial appeals should be determined" only "in accordance with the wishes of the part of the Empire primarily affected."

So much for domestic affairs. In the domain of foreign affairs the self-governing Dominions, with the exception of Newfoundland are recognized as possessing an international status by the Covenant of the League of Nations. In the Assembly of that body Great Britain, Canada, Australia, New Zealand, South Africa, the Irish Free State and India are members upon an equality with other nations of the world. They take part in the election of the judges of the Permanent Court of International Justice, and their right to sit in the Council is admitted, although that right has not yet been exercised. The provisions of the report in this matter are of great importance, recognizing that the British Commonwealth of Nations may make a treaty as such, with a single delegation for the whole; or that each member of the Commonwealth may appoint delegates of its own, that the members therefore may negotiate treaties as separate contracting parties, through their delegates; or that individual members may make treaties by their plenipotentiaries, with the understanding, however, that the intention to do so should be communicated in advance, and that before any treaties are concluded "which might involve the other Governments in any active obligations" it must "obtain their definite assent." In view of these circumstances, it was natural that the report should state in express terms the right of each autonomous State to appoint ministers plenipotentiary to the outside world. Ireland had already done so, with the consent of Great Britain, and immediately after the adjournment, Canada appointed its first Minister Plenipotentiary to Washington. The Government of Australia, if the press is to be believed, expressed, immediately upon the adjournment of the conference, its intention likewise of sending a Minister Plenipotentiary to the United States.

It would seem that the self-governing Dominions have preferred evolution to revolution, a preference which Great Britain is wise enough to share. The report would be strange reading to a foreigner or one unacquainted with the ways in which the English-speaking peoples work out their salvation. They "muddle through" in war, and they "muddle through" in peace. A solution of fact is preferred to a scientific theory. If the fact works, the status created remains; if it does not, the status is changed. And after years of experiment, a general principle is induced from the experiments in government. The inductive theory of my Lord Bacon is the favored method of his countrymen in working out their destinies.

What will be the ultimate result? Will the Empire be strengthened

through the process of decentralization, or will it be weakened in the course of time? The prophet's is at best a dangerous profession. In the case of the English-speaking peoples it is only safe after the event. The friends of Great Britain will be inclined to see in the Commonwealth of autonomous States united through the Crown a security for the future. Unfriendly critics, on the contrary, will be inclined to think that the autonomous colonies may sever the slight bonds uniting them whenever it may seem to be in their interest so to do.

The future must decide; but at the present moment, the British Commonwealth of Nations appears to be a vaster and more powerful Empire than that of Ancient Rome.

JAMES BROWN SCOTT.

THE LAW OF TERRITORIAL WATERS

Considerable skill as a juristic navigator is required of anyone attempting to explore the law of territorial waters. It is a badly charted sea which is liable to be stormy. Dr. Walther Schücking, member of the German Reichstag and *rapporteur* for the second subcommittee of the Committee of Experts for the Progressive Codification of International Law appointed by the League of Nations, is a navigator who shows great skill and some boldness in exploring this sea. His report is a masterpiece of scholarly analysis and exposition of the whole subject of territorial waters.[1] In a clear comprehensive manner he has summarized the opinions of publicists and the evidence of accepted usage to establish the main principles of international law applicable to the problem. He takes for his point of departure the basic principle of the right of a nation to sovereign dominion over its coastal waters, as amply confirmed in many recent international conventions, and in the municipal legislation of various nations on the subject of sovereign control of the air over their territorial waters.

Concerning the extent of territorial waters subject to sovereign dominion, Dr. Schücking effectively demonstrates through an admirable synopsis of the laws and usages of nations with reference to fishing, customs, and neutrality zones, that "the three-mile limit cannot be regarded as the zone of dominion generally accepted according to the practice and doctrine of international law."[2] This may seem an extraordinary conclusion to those who have been disposed to follow the Supreme Court of the United States in its apparently unwarranted assumption that the three-mile limit has become internationally standardized. It is an obvious conclusion, however, to those who like Dr. Schücking have carefully investigated the usages and precedents of most of the maritime nations.[3]

[1] See Special Supplement to this JOURNAL for July, 1926, pp. 64–120.

[2] *Id.*, p. 77.

[3] See lectures of George Grafton Wilson before the Academy of International Law at The

A further conclusion by Dr. Schücking is that most nations, and publicists on the law of nations, favor the extension of the territorial sea for specific purposes such as the adequate protection of fisheries and of the interests of neutrality. He even maintains that "a state has the right to extend its dominion to the range of the coastal guns."[4] He therefore recommends as *rapporteur* for the subcommittee that "the zone of the coastal sea shall extend for six marine miles (60 to the degree of latitude) from low-water mark along the whole of the coast."[5] It should be observed that this recommendation is in accord with the recommendations of the *Institut de Droit International* (session of 1894) and of the International Law Association (session of 1895). Although Dr. Schücking specifically included in this recommendation for the extension of the territorial waters the proviso that it should be without prejudice to the rights of other states by usage and special treaties, the final draft convention presented by the subcommittee recommends only a three-mile limit.[6] The grounds for this change in the draft, as stated by the *rapporteur*, were first, the difficulty of obtaining a universal agreement concerning fishery rights, and secondly, the fact that the United States and several of the "larger" states have recently accepted the limit of three miles. In the light of the mass of evidence adduced by the *rapporteur* to show that there is no general agreement concerning the extent of the territorial sea; that many nations are disposed to extend their dominion, and that the rights of other states could be specifically safeguarded, the reasons given for holding to the three-mile limit would appear insufficient.

The most significant recommendation included in the draft convention prepared by Dr. Schücking is for the recognition of the "rights of dominion by virtue of usage, and within the limits of such usage, beyond the zone of dominion in the following domains: police measures to prevent the possibility of military exercises being carried out by other states, and measures of customs and sanitary control."[7] This recommendation is amended in the draft finally presented by the subcommittee to read as follows: "Beyond the zone of sovereignty, states may exercise administrative rights on the ground either of custom or of vital necessity. There are included the rights of jurisdiction necessary for their protection. Outside the zone of sovereignty no right of exclusive economic enjoyment may be exercised."[8]

Hague in 1923 on the subject of *Les Eaux Adjacentes*, etc.; *Jurisdiction at the Maritime Frontier*, by Edwin D. Dickinson, in Harvard Law Review for November, 1926; also *Protective Jurisdiction over Marginal Waters*, by Philip Marshall Brown, in Proceedings of the American Society of International Law for 1923.

[4] Special Supplement to this JOURNAL, July, 1926, p. 77.

[5] *Id.*, p. 79.

[6] In his report to the International Law Association at Stockholm in 1924, Dr. Alejandro Alvarez reverted to the three-mile limit.

[7] Special Supplement, *id.*, p. 79.

[8] *Id.*, p. 141.

Mr. George W. Wickersham, who, with M. Barbosa de Magalhaes of Portugal, is also a member of this subcommittee, objects to the above declaration, though conceding the fact that nations have by long continued usage acquiesced in the general principle of the right of a nation to take protective measures outside of its territorial waters. He observes that:

> This clause goes far beyond anything which is commonly agreed to by states. In the first place, rights of the kind above described, which by long-established usage or convention a state may exercise beyond the limit of its territorial waters, can hardly be included in the description "administration." Secondly, while it may be true, as before remarked, that these rights are founded upon the broad principle of the defense of national interests, it cannot be conceded that a state, independently of long-established and accepted custom or treaty, has the right to exercise any power it may see fit beyond its territorial sea upon the ground that it is necessary to its protection.[9]

This warning concerning the possible arbitrary abuse of a right of this nature may be justified. It would seem, however, to be entitled to no further weight than the general objection that the exercise of any right may entail mistaken and unjust consequences. But the abuse of a right by no means should be held to vitiate the principle upon which it is founded. An objection of the kind suggested by Mr. Wickersham really concerns the right of redress and damages on the part of the party injured by the arbitrary action of another. As Chief Justice Marshall observed, in discussing the means which may be employed by a nation in the exercise of this right of national defence outside of its territorial waters: "If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to."[10]

The importance of the recognition of a variable zone of action within which a nation may protect itself outside of its territorial waters is readily apparent in the case of rum-running, as also in the smuggling of arms, contraband, or of undesirable immigrants. To those accustomed to think in terms of strict territorial jurisdiction within clearly defined limits, however, this recommendation of the Subcommittee on Territorial Waters may seem dangerous. This may be due in part to a certain connotation of the word *jurisdiction* which suggests a physical control over a definite area. If the term be used, however, in the sense of *authority to act*, it may properly apply to measures taken in defence of the right of national defence. The open sea is to be regarded as *res communis* and not as *res nullius* subject to appropriation or jurisdiction by any single nation. If this distinction is made, then the recommendation of the subcommittee for the recognition of another zone outside of territorial waters for the protection of recognized national interests would seem entirely reasonable and essential. Incidentally it

[9] Special Supplement to this JOURNAL, July, 1926, p. 139.
[10] Church *v.* Hubbart, 2 Cranch (U. S.) 187.

might prove a means of meeting in part the desire of some nations for an extension of territorial waters. The comment of Professor Dickinson in the article cited above would seem amply justified:

> In providing for such extraterritorial jurisdiction at the maritime frontier as may be essential for purposes of territorial protection, the Committee of Experts has taken a course which should be well understood by English and American courts, for which there are significant English and American statutory precedents, and which seem amply justified by the accumulated evidences of practice in many countries. It is a good augury that the Committee has been careful to distinguish the jurisdictional question from the question of the nature and extent of territorial waters. Both may be covered in a single convention if it is understood that each presents a problem *sui generis* requiring a unique solution.

Concerning the right of "pacific passage" through territorial waters, the report of the subcommittee merely recognizes the right without attempting to define what constitutes a pacific passage. It concedes the right to submarines navigating on the surface. With respect to jurisdiction over foreign vessels using this right of innocent passage, the subcommittee takes the generally accepted view that crimes and offences "the consequences of which are not confined to the vessel or the persons belonging to it, are subject to the criminal jurisdiction of the riparian state, in so far as they constitute offences against its established law and its tribunals have competence to deal with them. As offences the consequences of which are not confined to the vessel or the persons belonging to it shall be considered all offences which disturb the peace or public order of the territorial sea." (Article 9 of the draft convention.) The phraseology of Article 13, dealing with the subject of jurisdiction over foreign merchant vessels in maritime ports, is not quite so satisfactory: "The criminal jurisdiction of the riparian state shall be restricted to the punishment of offences committed on board which are not directed against a member of the crew or against passengers and their property. Its criminal jurisdiction shall further be restricted to cases in which the captain of the vessel has asked the port authorities for assistance and cases in which the peace or public order of the port has been disturbed." While it is generally conceded that there should be no interference with the "internal discipline" of the ship, the rule laid down so clearly by the Supreme Court of the United States in the Wildenhus Case would seem to express the intention of the subcommittee more satisfactorily: ". . . all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."[11]

Article 4 of the proposed draft convention, dealing with the subject of

[11] 120 U. S. 1.

bays, embodies the views now generally accepted to the effect that the territorial sea follows the sinuosities of the coast, "except that it shall be measured from a straight line drawn across the bay at the part nearest to the opening towards the sea where the distance between the two shores of the bay is ten marine miles, unless a greater distance has been established by continuous and immemorial usage." So also the provisions of Article 5 to the effect (1) that the territorial sea shall be measured from islands off the coast unless they are too distant to be included in the territorial sea of the mainland, in which case they will have their own territorial sea, and (2) that the territorial sea of archipelagos shall be measured from the islands most distant from the centre of the archipelago.

Article 6 on the subject of straits may be open to question in that it proposes that "straits not exceeding ten miles in width whose shores belong to different states shall form part of the territorial sea as far as the middle line." The choice of the main channel or *thalweg* would seem better calculated to avoid vexatious disputes.

The provisions of Article 11 concerning riches of the sea, the bottom and the subsoil, and of Article 12 concerning warships, would not seem to call for special comment.

Dr. Schücking's proposal for the establishment of an International Waters Office for the registration of special rights, and with authority to deal with controversies arising out of the draft convention, subject to appeal to the Permanent Court of International Justice, was not adopted by the subcommittee, though no reason is given for such action.

In submitting this report to the consideration of the various governments concerned, the chairman of the League Committee of Experts, Mr. Hammarskjöld, observes, "Its principal task at present is to direct attention to certain subjects of international law the regulation of which by international agreement may be considered to be desirable and realizable. In doing this, the committee should doubtless not confine itself to generalities but ought to put forward the proposed questions with sufficient detail to facilitate a decision as to the desirability and possibility of their solution."[12] This observation is in a sense a word of warning. No government should commit itself even in principle to the views and conclusions presented by the Committee of Experts for the Progressive Codification of International Law without the most profound consideration and investigation. Universal or general agreement on many of these subjects may be impossible or excessively difficult to obtain. It can only be based on sound study and fullest discussion. The report of the Subcommittee on Territorial Waters is admirable for this purpose and furnishes a most valuable reference source for all who may be anxious to contribute to a better understanding of one of the outstanding problems of international law.

PHILIP MARSHALL BROWN.

[12] Special Supplement to this JOURNAL, July, 1926, p. 223.

DENATIONALIZATION OF AMERICAN CITIZENS

The denationalization of American citizens of Indian blood through the cancellation of their naturalization certificates, which has been going on since the decision of the United States Supreme Court in the Thind case in 1923 (261 U. S. 204), has lately received a check through a decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of U. S. *v.* Sakharam Ganesh Pandit (November, 1926). Pandit is a Hindu of Brahmin caste, a graduate of the University of Pathashala, Benares, a teacher and member of both the California State and Federal bars, a notary public by appointment of the Governor of California, the owner of a home in Los Angeles, and the husband of an American-born white wife, herself the owner of 320 acres of land in California which she had entered in her own right. In 1914 Pandit had been naturalized by the Superior Court of San Bernardino County in California, which held that he was "beyond all reasonable doubt a 'free white person' within the meaning of the Naturalization Act."

In June, 1923, following the decision of the United States Supreme Court in the Thind case, that high caste Hindus of full Indian blood were not "free white persons" and therefore not eligible to naturalization, a suit was commenced in the United States District Court to cancel his certificate on the ground that it had been "illegally procured." The defendant pleaded that his naturalization certificate had been legally issued by a court of competent jurisdiction after it had heard the objections raised by a representative of the United States, and that the cancellation of the certificate would result in great wrong to him in that, among other consequences, he would lose his right to practice law, lose his office of notary public and the income therefrom, that his wife would be deprived of the land which she had acquired from the United States by entry and upon which she had spent money for reclamation and other purposes, etc. The District Court dismissed the suit, and upon appeal the decision was affirmed by the Circuit Court of Appeals.

The ground upon which the decision was based was that the matter of Pandit's citizenship was *res judicata*. The court which granted the certificate of citizenship had undoubted jurisdiction to do so; it heard fully the objections raised by the government representative, and concluded that they were not valid and that the applicant was a "free white person," and therefore eligible to naturalization. From this decision the government took no appeal, as it might have done. In view of the subsequent decision of the Supreme Court in the Thind case, the court, of course, committed an error in holding that Pandit was a "free white person," but that fact could not be relied upon to support the contention that the certificate had been "illegally obtained." When a court of competent jurisdiction grants a certificate of naturalization after hearing the objections of the government, the decision is final, subject only to the right of appeal, and whether it is good or

bad in law is immaterial. In short, it is conclusive as to all *media concludendi* and cannot be impeached by showing that it was based upon errors of law. In the Thind case, it may be observed, no question as to *res judicata* had been raised by the defendant. There the action was in the nature of an appeal from the decision of the court granting the certificate, and the ground of the appeal was error in the interpretation of the meaning of the words of the statute "free white persons." In the present case, the government had neglected to avail of its right of appeal within the time allowed, and the issue having been determined by a court of competent jurisdiction, it could not now be disputed.

The decision does not, of course, alter the status of high caste Hindus; that they are not "free white persons" and therefore not eligible to naturalization was finally determined by the Supreme Court in the Thind case, and the effect of that determination can only be removed by statute. To naturalized Hindus in the United States the only relief which the present decision brings is the protection it affords against the cancellation of their certificates when obtained in good faith from courts of appropriate jurisdiction, and when the government fails to exercise within the time allowed its right of appeal. Whenever this right is exercised, the certificate will, in accordance with the judgment of the Supreme Court in the Thind case, have to be revoked. Until the statute as now interpreted by the Supreme Court is changed, not only the door of American citizenship must remain closed to Hindus in the future, but those who in the past have been naturalized can be deprived of the citizenship, which in some cases they have enjoyed for many years, and with it valuable rights, professional, legal, political, and economic, which it carries. What is more tragic, since their original nationality does not revert, they are left in the unfortunate position of being stateless, with no country to which they owe allegiance or whose protection they can claim. If this were not enough, their American-born wives, under the Cable Act and the retroactive application of the Supreme Court decision, have likewise been denationalized and reduced to the plight of statelessness, for no offence except that of marrying a person ineligible to American citizenship, which means Hindus, Chinese and Japanese, and not Africans or members of any European race, however inferior it may be. There is now a bill before Congress, introduced by Senator Copeland, which proposes to amend Section 2169 of the Revised Statutes by enumerating the races whose members shall be deemed "white persons" within the meaning of this section. Among the races specified is the Hindu race. The Chinese, Japanese and other Asiatic races, however, are not included. At its recent convention in Detroit, the American Federation of Labor adopted a resolution endorsing the Copeland bill and instructing its executive council to use its efforts to have the bill enacted into law.

J. W. GARNER.

THE IMMUNITY OF PUBLIC SHIPS EMPLOYED IN TRADE

The warships of a friendly foreign state are immune from the local jurisdiction when entering local ports or territorial waters. The rule is a logical development of the general principle of state immunity and was first authoritatively declared by an American court in the well-known case of Schooner Exchange *v.* M'Faddon.[1] As applied to warships, and for that matter to ships employed in other indispensable public services, it seems never to have been very effectively challenged. It has been regarded as a necessary application of an established doctrine.

The requisition or chartering of vast merchant fleets by belligerent governments early in the World War and the rise during and after the war of government-owned and operated fleets employed in the carrying trade, produced novel problems. Should public ships employed in trade be granted all the immunities given other public instrumentalities? Governments had gone extensively into the maritime carrying business. Should they be permitted to take their immunities with them?

In England the courts had not only approved long since and applied Schooner Exchange *v.* M'Faddon,[2] but they had amplified its principle to cover state ships employed in other public services, including even ships employed in part in public services and in part in carrying for hire.[3] The English courts found no satisfactory basis for a distinction or limitation; and with many manifestations of reluctance they soon extended the principle of immunity to public ships employed in trade.[4] In America the courts were pressed by the same logic and distressed by the same difficulty in finding a defensible distinction. Several attempts to present the issue to the Supreme Court failed for one reason or another. The court remarked that the question was "debatable"; that it was "one of obvious delicacy and importance"; but in each instance the court concluded that it was not required to pass upon the question.[5] Meanwhile the lower Federal courts struggled with the problem. In perhaps the most notable of the decisions rendered by lower Federal courts, Judge Mack made a valiant effort to justify a distinction which would have confined immunity to ships used for a public or governmental purpose as distinguished from purposes essentially private in nature. He denied that an enterprise becomes public merely because the government engages in it, and contended that immunity is not justified when governments invade fields hitherto regarded as reserved primarily for private exploita-

[1] (1812), 7 Cranch, 116.

[2] *The Constitution* (1879), L. R. 4 P. D. 39.

[3] See *The Parlement Belge* (1880), L. R. 5 P. D. 197; Young *v.* S. S. *Scotia* [1903], A. C. 501; *The Jassy* [1906], P. 270.

[4] See *The Gagara* [1919], P. 95; *The Porto Alexandre* [1920], P. 30; Owners of S. S. *Victoria v.* Owners of S. S. *Quillwark* (1922), 1 Scots L. T. 65; *The Jupiter* [1924], P. 236.

[5] See *Ex parte* Muir (1921), 254 U. S. 522; *The Pesaro* (1921), 255 U. S. 216; *Ex parte* Hussein Lutfi Bey (1921), 256 U. S. 616; *The Gul Djemal* (1924), 264 U. S. 90.

tion.[6] Judge Mack's opinion was widely commented upon and generally commended; but he stood almost alone, among the Federal judges, in defense of his position.[7] And now the Supreme Court, confronted at last with a clear presentation of the question, has repudiated the distinction upon which he sought to stand.[8]

In the case of *The Pesaro*, decided by the Supreme Court on June 7, 1926, an *in rem* action to recover for damage to cargo had been brought against a vessel of the Italian Government's merchant fleet in the United States District Court for the Southern District of New York. The ship was owned and operated by the Government of Italy. It was not a part of the Italian naval or military forces, but was employed in carrying goods and passengers for hire. After the ship had been arrested and released on bond, a plea of immunity was filed on behalf of the Italian Ambassador. The District Court sustained this plea and dismissed the libel for want of jurisdiction.[9] The libelant appealed to the Supreme Court of the United States.

The Supreme Court held that the libel was rightly dismissed, that a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a Federal District Court exercising admiralty jurisdiction. The precise question, it was said, had never been before the court. The English courts had resolved it in the same way as the court below. Lower Federal courts were not agreed upon the correct solution. The decision of the Supreme Court in the early case of Schooner Exchange *v.* M'Faddon was the most relevant precedent. After stating the facts in the case of *The Exchange*, and quoting extensively from Chief Justice Marshall's opinion (approximately one-fourth of the opinion in *The Pesaro* consists of quotation from Schooner Exchange *v.* M'Faddon), Mr. Justice Van Devanter continued:

> We think the principles [announced in Schooner Exchange *v.* M'Faddon] are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

The doctrine of immunity is regarded with much less favor today, and rightly so, than it was in an earlier period. Where its restriction would be

[6] *The Pesaro* (1921), 277 Fed. 473 (but see 13 F. (2d) 468). *Cf.* Kingdom of Roumania *v.* Guaranty Trust Co. (1918), 250 Fed. 341.

[7] See *The Maipo* (1918), 252 Fed. 627; *The Maipo* (1919), 259 Fed. 367; *The Carlo Poma* (1919), 259 Fed. 369 (but see 255 U. S. 219).

[8] *The Pesaro* (1926), 46 Sup. Ct. 611; this JOURNAL, Vol. 20, p. 811.

[9] 13 F. (2d) 468.

welcomed, its amplification is likely to be deplored.[10] There will be considerable disappointment, therefore, that the Supreme Court should have felt constrained to come to this result.[11] The present writer shares in the feeling of disappointment, yet he is not entirely confident that the Supreme Court would have been well advised to embark upon a different course. The only general distinction urged upon the court as a justification for denying immunity was the distinction between public ships employed for public governmental purposes and public ships employed in private trade. Judge Mack relied upon this distinction in the decision mentioned above. Recent conferences of the International Maritime Committee have apparently discovered nothing better. However, as a definition of the limit beyond which immunity may not be invoked, it gives no promise of proving a workable judicial distinction. A similar distinction invoked to mark the limits of the Federal taxing power over State instrumentalities in the United States has not been altogether satisfactory.[12] In the law of municipal corporations the difference between public or governmental functions and private or ministerial functions has been much confused.[13] "What is considered a private purpose today may be a public purpose and governmental function tomorrow."[14] In dealing with ships there would of course be many mixed cases in which it would become necessary to create additional categories of vessels used chiefly, primarily, or preponderantly for one purpose or the other. And in dealing with the ships of foreign states there would be many delicate considerations making the application of the distinction peculiarly difficult. Possible the Supreme Court resolved the question most prudently by amplifying an understood and well tried rule, leaving it to governments by conference, treaty, and statute to bring the system of immunities into harmony with modern conditions.

In any event, on the precise question which the facts in the case of *The Pesaro* presented, United States courts are now committed to a doctrine in harmony with that previously approved by the English courts. There are certain other situations in which it may be assumed that immunity will be granted *a fortiori*.[15] Still others, however, remain undetermined. What to

[10] Perhaps amplification is not an exact description of the alternative to restriction. Delivering an oral opinion in *The Maipo*, 259 Fed. 367, Judge Hough remarked: "I think the bar is entitled to know that I do not think the enormous extension of sovereign privilege demanded by vessels in all kinds of business of late months and years indicates any change or advance in the law at all. The law remains the same. What has changed is the view which the governments of the world assume toward public duties or public enterprises."

[11] See the opinion of Professor Garner, this JOURNAL, Vol. 20, pp. 759, 766.

[12] See South Carolina *v.* United States (1905), 199 U. S. 437. *Cf.* United States *v.* King County (1922), 281 Fed. 686.

[13] *Cf.* Los Angeles *v.* Los Angeles Gas & Electric Corporation (1919), 251 U. S. 32, with Jones *v.* District of Columbia (1922), 279 Fed. 188. See Borchard, "Government Liability in Tort," 34 Yale Law Journal, 1, 129.

[14] Paulus *v.* State of South Dakota (1924), 201 N. W. 867, 870.

[15] See *The Pampa* (1917), 245 Fed. 137.

do with the publicly-owned ship in private possession,[16] with the privately-owned and operated ship under government requisition,[17] with the privately-owned and operated ship under time charter to the government,[18] or with the privately-owned and operated ship under charter to the government but not yet in its possession,[19] has not yet been finally and authoritatively decided. The indispensable tests of immunity are not yet judicially defined. It may be that we shall have a new regulation of the problem by international agreement before the perfection of judicial doctrine is attained.[20]

EDWIN D. DICKINSON.

THE FUTURE OF INTERNATIONAL ARBITRATION

On November 11, 1926, President Coolidge, in his Armistice Day Address delivered at Kansas City, clearly stated the position of the United States with reference to the adherence by this country to the Permanent Court of International Justice established under the Covenant of the League of Nations. He also indicated how the conditions laid down in the Senate resolution on the subject had been received by other nations. He stated:

> While the nations involved cannot yet be said to have made a final determination, and from most of them no answer has been received, many of them have indicated that they are unwilling to concur in the conditions adopted by the resolution of the Senate. While no final decision can be made by our government until final answers are received, the situation has been sufficiently developed so that I feel warranted in saying that I do not intend to ask the Senate to modify its position. I do not believe the Senate would take favorable action on any such proposal, and unless the requirements of the Senate resolution are met by the other interested nations I can see no prospect of this country adhering to the court.

Presumably this position of the President is final inasmuch as he does not refer to the World Court in his annual message.

Without attempting to go into the merits of the question of adherence, it is timely to consider the relation of the United States to the settlement of international controversies if, as President Coolidge indicates, there is no prospect of this country joining the World Court.

[16] See *The Davis* (1869), 10 Wall. 15; Long *v. The Tampico* (1883), 16 Fed. 491; The Johnson Lighterage Co. (1916), 231 Fed. 365. *Cf.* Young *v.* S. S. *Scotia* [1903], A. C. 501.

[17] See *The Attualita* (1916), 238 Fed. 909. *Cf. The Roseric* (1918), 254 Fed. 154; *The Broadmayne* [1916], P. 64; *The Messicano* (1916), 32 T. L. R. 519; *The Eolo* [1918], 2 Ir. Rep. 78.

[18] See *Ex parte* Muir (1921), 254 U. S. 522.

[19] See *The Beaverton* (1919), 273 Fed. 539.

[20] See the Report of the League of Nations Committee of Experts on "Legal Status of Government Ships Employed in Commerce" [C. 52. M. 29. 1926. V.], printed in Special Supplement to this JOURNAL, July, 1926, pp. 260–278. See also Professor Garner's comment, this JOURNAL, Vol. 20, p. 759.

If the United States does not become a member of the World Court, where does this country stand with reference to the peaceful settlement of international disputes? It stands about where it was before the outbreak of the World War. Up to that time the chief method of adjusting international difficulties, aside from diplomacy, had been by means of arbitration. The United States had been the leading country in advocating the use of international arbitration. The Jay Treaty of 1794, between the United States and Great Britain, introduced arbitration into modern statecraft, the Alabama Claims Arbitration under the treaty between the United States and Great Britain of 1871, is generally conceded to have avoided war between the two countries; at the First and Second Hague Conferences the efforts of the United States obtained the assent of the assembled nations to general treaties establishing the Permanent Court of Arbitration at The Hague and providing for optional resort to an arbitration court or to a commission of inquiry; the United States sponsored the Central American Court of Justice which has been said to have been the most complete international court in existence; Secretary Root initiated the bilateral arbitration treaties of 1908–1909 binding the signatories to refer to the Court of Permanent Arbitration at The Hague questions of a legal nature or relating to the interpretation of treaties, except matters of vital interest, independence or honor; Secretary Bryan negotiated the peace treaties of 1913–1914, binding the parties to submit all disputes to investigation and report by a mixed commission before resort is had to war. The United States holds an enviable record in the progress of international arbitration.

The United States may well start from this point to further develop and advance the science and practice of international arbitration, both through the Permanent Court of Arbitration at The Hague, and by other tribunals.

Some may think that The Hague Arbitration Tribunal has been superseded by the Permanent Court of International Justice. This is not so. They exist side by side. In fact the League Covenant, in Articles 12 and 13, recognizes both institutions. Moreover, the Paris Peace Treaties established various forms of arbitration for the settlement of a great variety of questions. It is said that thousands of decisions under these treaties have been satisfactorily rendered. From 1794 to 1914, it is said that states have held over 1,000 arbitrations. Arbitration, therefore, is an established and common procedure, and has, as a rule, won the esteem and confidence of nations as a method of settling their disputes, and in the present stage of progress it has many advantages to recommend it.

Perhaps too much has been made of the distinction between arbitration and judicial settlement. It is said that arbitration is a settlement of differences by judges acting on a basis of respect for law, who are chosen and remunerated by the parties, but who and, therefore, may not necessarily be impartial and may be even friendly to one of the litigants. On the other hand, judicial settlement is a decision of controversies by judges who are not

selected or appointed by the parties and do not receive any reward from them, and, therefore, are presumed to be impartial as there is no necessary relation between their choice or their pay and their decision.

Although arbitral tribunals composed entirely of national members, with the right to name an umpire in the case of a tie, have proved to be a satisfactory means of adjusting controversies, nearly all arbitral tribunals have one or more neutral members. As a rule, the choice of the neutral arbitrators is, in the first instance, by common agreement, not by one of the parties. The scrutiny and challenge of both sides makes the resulting selection closely approximate an impartial judge. At any rate, if nations can settle their disputes satisfactorily by the selection of their own judges, who is there that should object. Why should issues in which litigating Powers are deeply interested be decided by foreigners on both the facts and the law without appeal? If the neutral members are selected by an independent agency, as frequently occurs, then certainly the method of selection cannot be criticized.

The matter of compensation of arbitrators would not appear to influence the award where there is an umpire or other neutral members, for they are customarily paid by the two litigants in equal shares, and this provision is generally known beforehand and incorporated in the arbitration agreement. The objection, therefore, that arbitrators are selected and paid by the parties, is not wholly a valid one. It is apparent that however a judge on an international tribunal is appointed he will in the present day carry with him to the bench predilections based upon his previous education, training and experience, and while he may strive and, to a certain degree succeed, in putting aside these feelings and assume a judicial attitude, he will nevertheless be influenced, consciously or unconsciously, by his life and environment. In questions where nationality has an influence, would a judge selected by independent authority rather than by the parties have any better qualifications for, or assume any higher degree of impartiality than, an umpire selected by an agreement of the parties or by an independent agency named by the parties?

It is further objected that national arbitrators have no place on an arbitral tribunal. However, it is rarely the case that nationals compose the entire tribunal, there being almost always a neutral umpire and frequently two additional neutral members. The retention of national members, however, is recognized by the Statute of the Permanent Court of International Justice which provides for their selection by the contesting countries (Art. 31). The advantage of having a national member on the tribunal is that he may explain to the other members and to the umpire the arguments of his government and the meaning and application of any local laws of his country which have a bearing on the controversy or its origin.

Arbitration has been regarded as leaning toward diplomacy rather than toward jurisprudence and as subject to being swayed by political motives or national policies. However, the flexibility of arbitration is in its favor.

The jurisdiction of the tribunal is not necessarily limited to purely legal questions. Matters of a broader scope, involving not only legal and equitable principles, but political considerations as well, may be submitted. Indeed the limits of arbitration are only those fixed by the parties themselves. As a matter of practice, arbitral tribunals apply principles of law and follow the rule of *stare decisis* in much the same manner as do courts of justice. That eminent jurist, John Bassett Moore, now a member of the Permanent Court of International Justice, who has given close study to the decisions of arbitral tribunals, stated on May 29, 1917, in an address before the Academy of Political Science:

> It is said that heretofore we have had arbitration, but that arbitration has failed, and that now we are to have the "judicial settlement" of international disputes. Such statements illustrate the propensity to accept phrases rather than to search for facts. . . . I venture to assert that the decisions of those international tribunals are characterized by about as much consistency, by about as close an application of principles of law, and by perhaps as marked a tendency on the part of one tribunal to quote the authority of tribunals that preceded it, as you will find in the proceedings of our ordinary judicial tribunals. One cannot study these records without being deeply impressed with that fact, and without discovering how lacking in foundation is the supposition that when we talk of the "judicial settlement" of international disputes we are presenting some new device or method.

On the whole, therefore, there would seem to be little, if any, valid objection to, or any real disadvantage in, arbitration as a method of settling differences between nations as compared with a strictly judicial proceeding.

Turning to the advancement of the science of arbitration, there is opportunity to improve the method of pleading before arbitral tribunals. The ancient practice of the parties in presenting their initial pleading simultaneously in the form of a "case" with documents attached, and in answering simultaneously with a "counter-case" also accompanied by evidence, should be changed. It is true this procedure maintains the fiction of equality of independent sovereign states by not giving to either party the character of plaintiff or defendant, but as a matter of fact in every international dispute there is a demanding government (complainant), and a defending government (defendant). One is demanding rights of which it has been wrongfully deprived and the other is endeavoring to preserve the *status quo*.

This dual or coördinate method of procedure should be changed to the alternate method of pleading common in domestic courts. The complainant government should be the first to submit a case, which the government defending should answer with a counter-case, to which the complainant might reply, and in certain cases the defendant might be entitled to file a rejoinder.[1] Each of these pleadings should be accompanied by the evidence relied upon

[1] The Need of Revision of Procedure Before International Courts of Arbitration, by Robert Lansing, Proceedings American Society of International Law, 1912, p. 158 *et seq.*

to support the allegations made. This is the method of pleading used by recent claims commissions, and this method is substantially adopted by the Permanent Court of International Justice in cases instituted by application.[2]

The objection that the alternate method of pleading causes the plaintiff state to lose an advantage by disclosing its position first is offset by the fact that by the time an international difference has reached the arbitration stage, the positions of both governments are fairly well known to each other from the diplomatic correspondence on the subject.

The dual method of pleading results in a confusion of issues and an increase in the labor of the court, in a temptation to hold out for the counter-case evidence which ought to accompany the case, and in an expensive duplication of documentary proof.

In many arbitrations it has been an embarrassing question as to which party should proceed first with the oral argument. This has been thought to depend upon which party was plaintiff in the case, and the tribunal has at times had this question presented to it for decision early in the hearings. If the dual method of pleading were replaced by the alternate method, this question would be solved, for the order of the arguments would follow the order of the pleadings.

There is also the desirability of defining more precisely the scope of the pleadings, that is, of defining *case*, *counter-case*, *reply*, and *rejoinder*, as used in international arbitration. Among other points to be determined is the question whether the presentation and discussion of questions of law and issues raised by the evidence should be excluded from the pleadings and postponed until the printed or oral arguments.

As to the scope of arbitration in general, there is a broad field for development. It seems that an effort could be made to reduce the number of questions excluded from arbitration in the treaties of the United States. What is meant by the exception of national honor, vital interests and independence? These phrases are vague and indefinite. The result is that they are generally defined by the statesmen who are called upon to apply the exception, and it frequently happens that they serve as an excuse for avoiding arbitration of an embarrassing question which is not only a proper question for arbitration but one which should be submitted to decision. As a rule, a country is either right or wrong, and this question can be determined by a tribunal of capable and reasonable men. It is understood that in arbitration treaties made since the war the exception of national honor and vital interests has largely disappeared save in Anglo-Saxon treaties. There is a chance here for the United States to try again to expand the scope of arbitration. For example, why should not the formula used in the Taft arbitration treaties of 1911, which failed because of the question of submitting the *compromis* to the

[2] In cases instituted by a special agreement of the parties the dual method of procedure is retained.

Senate, be made the subject of a general arbitration treaty? This formula was to submit

> All questions . . . relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity.

On the other hand, the formula, in Article XIII of the League Covenant might be used in a general treaty agreeing to arbitrate all

> Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach.

Either of these formulae is broader than anything now contained in our arbitration treaties. All remaining questions could be submitted to a commission of inquiry for investigation and report on the facts without decision, or to a commission of conciliation for the submission of proposals for a settlement *ad referendum*. Of course, the goal is to submit all disputes of whatever nature to arbitration. An example of such a treaty is that between Peru and Uruguay of July 8, 1917. But it is too much to expect that this goal will be attained immediately.

It might be opportune also to combine arbitration treaties with an agreement not to wage war, as was done at Locarno. The Locarno Agreement not only declares the purpose not to resort to war, but provides that the states shall undertake to settle by peaceful means all questions of any kind which may arise between them. If the Governments of Germany, Belgium and France could enter into such a treaty after the late war, there is hope that some plan of the same sort might be evolved for general application.

There is occasion for the negotiation of conventions for the settlement of pecuniary claims by arbitration below a stated amount without reference of the *compromis* to the United States Senate. A limit of say $500,000 might be fixed below which any international pecuniary claim might be arbitrated by the United States as a matter of course without submitting the *compromis* to the Senate. If this could be done within safe limitations, it would be a step forward in the facility of settling a class of disputes of secondary importance which often drag along through years of diplomatic correspondence with only irritating results. Whether the Senate would waive its prerogatives in this regard and agree in advance once for all to arbitrate such claims is uncertain. Without any wish to be critical, it is a fact that a serious obstacle to the promotion of general arbitration by the President of the United States, is the requirement of the Senate that all agreements to arbitrate under a general treaty must first be approved by it. If the Executive had as much latitude in this respect as he has to enter into trade agreements under a general Act of Congress, the cause of arbitration would be advanced.

The arbitration of pecuniary claims might also be advanced by a general

agreement, or a series of bi-lateral agreements between the United States and other countries, whereby a standing arbitrator is appointed who shall be ready to consider and decide, on the presentation of pleadings and written arguments, pecuniary claims between two countries arising out of international wrongs to citizens of the one or the other country. Such an arrangement would facilitate the settlement of international claims within a reasonable time and before the evidence becomes lost or destroyed, or the dispute an irritating controversy.

Another subject which might be taken up for consideration is that of promoting arbitration of civil controversies between American citizens and citizens of foreign countries which ordinarily would be taken before the courts of the one or the other country. Any one who has had experience in bringing suits in a foreign country knows the difficulties and uncertainties with which an American citizen is confronted when he is referred to foreign courts for justice. We may assume that the same is true when foreign citizens are referred to American courts with our complicated system of State and Federal jurisdictions. It is known that unscrupulous persons hide behind this legal screen to avoid payment of their just debts or compensation for their civil wrongs. It is believed that a plan could be worked out by means of treaties between nations providing for the settlement of such civil disputes by a standing arbitration board, or by a private arbitrator chosen by the disputants from lists prepared by the respective foreign offices, or other agencies. It has been suggested that compliance by the defendant with a demand for arbitration could be obtained by making a refusal to arbitrate without just cause, a misdemeanor punishable by the defendant's government. Compliance with the awards and payment of costs could be enforced through proper bonds given by the parties conditioned on performance of the award and payment of the costs. Possibly such a system of private arbitration would reduce the delays, inconveniences and expenses due to bringing suits in foreign countries, and it probably could be supervised by the foreign offices without their undertaking any undue responsibilities in the premises.

The purpose of such a plan would be simply to make commercial arbitration compulsory on the defendant upon application of the plaintiff. One difficulty with commercial arbitration, which is so widely advocated today, is that the defendant takes advantage of the fact that he is in a foreign country and can only be pursued by the plaintiff according to the foreign laws. The general plan would include not only cases where the parties have a clause in their contract to submit disputes to arbitration, but to cases where there is no such clause, as well as to the class of civil wrongs known as torts. The proceeding should be as untechnical as possible in the submission of evidence and arguments, and it should be optional to the parties to submit their controversies upon documents and written statements with or without hearings for oral testimony or oral argument.

L. H. WOOLSEY.

PROJECTS OF THE AMERICAN INSTITUTE OF INTERNATIONAL LAW ON IMMIGRATION, RESPONSIBILITY OF GOVERNMENTS, DIPLOMATIC PROTECTION, AND EXTRADITION

Project 14 of the draft codes to be discussed by the Commission of Jurists at their 1927 meeting in Rio Janeiro deals with immigration. Its sole article leaves it to each country to determine for itself the aliens or classes of aliens whom it will admit to the territory or to citizenship. This represents the classic position of the defenders of the alleged unlimited sovereignty of the state in excluding aliens, and doubtless the current doctrine of international law. That the policy arouses resentments which are not always restrained or allayed by the legal argument, is a fact which the political scientist must and the lawyer ought to take into account. Perhaps some day an international comity clause or a doctrine of "unconstitutional conditions" applicable internationally may modify the rigor of the prevailing exclusion policy.

Project 15, consisting of two articles, deals with the responsibility of governments for injuries sustained by foreigners in the territory of the American Republics. The articles seem somewhat inconsistent. Article 1 provides that the government "is obliged to maintain . . . the internal order and governmental stability indispensable to the fulfillment of international duties." What is meant by "obliged"? And does the clause "indispensable to the fulfillment of international duties" limit or merely describe the obligation? Is a country bound internationally, and subject to legal responsibility to aliens or their states, to maintain "internal order and governmental stability"? It is true that such a measure of guaranty has occasionally been imposed on weak states by strong states and the former have thus been held responsible pecuniarily for injuries due to their very weakness, usually arising during revolutions. But this is directly contrary to the Latin-American thesis, which is more clearly, though not unambiguously, expressed in Article 2. While beginning with the premise that the government is not responsible for damages sustained by foreigners, it makes three exceptions: (1) when the government has "not maintained order in the interior," which again raises the question whether the government is to be a guarantor; (2) when the government has been "negligent in the suppression of acts disturbing" internal order, perhaps an admitted though usually unprovable ground of responsibility; and (3) has "not taken precautions," so far as possible, "to prevent the occurrence" of damage or injury to aliens. Inasmuch as exceptions (2) and (3) presumably cover the usual grounds of liability, failure to prevent or to punish a preventable or punishable offense, the inference follows that exception (1) and the obligation imposed by Article 1 are intended to embrace a measure of guaranty for the existence of internal order and governmental stability. But as no government, under international law, and particularly the Latin-American Republics, could or should be held to such an exceptional standard of responsibility, it is difficult

to suppose that the alleged obligation will not be modified in the final draft. No country would probably be willing to guarantee foreigners against the accidents or consequences of revolution, and international law certainly imposes no such obligation. If a country exerts its best efforts, a fact which may usually be presumed, to maintain internal order and governmental stability, neither aliens nor citizens should be privileged to ask more. Project 16, on diplomatic protection, gives rise to the inference that perhaps Project 15 does not really intend to concede more than that.

Project 16, consisting of eleven articles, deals with the diplomatic protection of citizens abroad. The preamble admits that this is a matter of special importance to the American Republics. Article 1 provides that foreigners have no greater rights than nationals have in constitutions, laws and "treaties." (But as nationals of a country usually derive no rights internally from treaties with foreign countries, the article will probably be somewhat redrafted.) This again represents a Latin-American thesis which foreign countries and the decisions of international tribunals do not, without qualification, admit. Foreigners are only obliged to accept equality with nationals if the legal system in general and in the applicable detail accords with or maintains the standards of civilized justice or what may be called international due process of law. With this qualification, Article 1 should be accepted; but one of the possible dangers of the forthcoming conference may be that the United States will either be overwhelmingly outvoted or that its delegates will embarrass the government by approving an article which the government, supported by prevailing doctrines of international law, may feel obliged to repudiate. Had Article 1 of Project 15 contained a guaranty of due process of law "indispensable to the fulfillment of international duties," instead of what seems like a guaranty of "internal order and governmental stability," it would probably have been more in accord with international law and realities.

Article 2 concedes to each government the right diplomatically to protect its citizens, native and naturalized, the conditions of its exercise to depend "entirely" on internal legislation. This can be accepted only with reservations, it would seem, especially by Latin-American countries, for diplomatic protection is essentially an international process, subject to international rules. If municipal rules transgress the bounds set by international law, obviously they cannot "entirely" prevail.

Articles 3 and 4 set certain conditions and limitations upon protection, which indicate that the protecting country is not intended to be the exclusive judge of the conditions and justification of diplomatic interposition. Such interposition is conceded by Article 3 when the citizen has no local remedy for his injury, or if justice is denied or unduly delayed, or the principles of international law are violated. Does "international law" under Article 3 prevail over the provisions of Article 1, which contains no such limitation? The conference must settle the ambiguity. Article 4, in a manner now

familiar, seeks to give a legislative definition to the term "denial of justice." It embraces three alternatives: (a) when the domestic authorities interpose legally unwarranted obstacles to the foreigner's exercise of his rights and, probably, of his resort to local remedies; (b) when his rights have been disregarded "without legal reason," "or for reasons contrary to the principles of law," whatever that may mean; (c) when the local rules of procedure have been violated and there is no appeal. These rules seem to be somewhat crudely drawn, for (a) and (b) mark no clear distinctions. What is the difference between "not authorized by law" in (a) and "without legal reason" in (b)? Rule (c) may be designed to revive the old Latin-American thesis that when the local courts are open and the local procedure applied, there is no ground for asserting a "denial of justice." The article avoids some of the most controversial of the issues raised in the international debate centering around the term, *e.g.*, the independence of the judiciary from executive control, the extent to which the local rules of procedure conform to due process of law internationally, the effect of a grossly unjust judgment, and similar questions. The article might have gone further in support of the Latin-American thesis; as it stands, it is vague and cumbersome and contributes little of value to a difficult subject.

Article 5 merely provides that a country may protect not only its own nationals but the nationals of other countries with the protection of whose interests its diplomatic representatives have been entrusted. The need for such an article is not especially apparent, for custom has made the rule obvious and, so far as the writer knows, inasmuch as local consent to the delegation of power is usually necessary, it has not been challenged.

Article 6 is designed to give the defendant country the privilege of rejecting a claim if presented on behalf of an alien who has interfered in local politics or has committed hostile acts against it. This may be useful, for heretofore the discretion to protect such aliens has usually been supposed to lie with the protecting foreign government. This is another limitation on protection contradicting Article 2.

Article 7 is designed to prevent interposition on behalf of a person possessing dual nationality, one of which nationalities is that of the defendant country. This merely embodies a generally accepted rule of international law.

Article 8 codifies the well-established rule that a claimant must have been a national of the protecting country at the time the claim arose and at the time of presentation.

Article 9 provides that protection may be extended not only to individuals but to corporations, nationals of the protecting country. The criteria of corporate nationality the article does not profess to state; but this in fact, in view of the confusion created by the war and the treaties, is one of the most important gaps in the law of claims. There is now no accepted international test for determining the nationality of corporations; one or more should be agreed upon.

Article 10 seems designed to prevent the assignment of international claims, by forbidding protection to nationals who are assignees of claims. If, however, the original claimant and assignor was a national and the claim has been continuously national, there would seem but little reason for the proposed rule.

Article 11 is one of the most commendable of the whole project, for it provides that diplomatic claims between the American Republics must be submitted to arbitration or to an international court, when not settled by direct negotiation. This carries the Drago doctrine and the Porter proposition several steps further, by extending the limitations to all subjects, not merely public debts or contract claims, and by omitting the unhappy qualification of a conditional resort to force if arbitration is refused. The Latin-American Republics at the 1902 conference in Mexico agreed to a convention on pecuniary claims embodying somewhat similar provisions. Its confirmation in 1927, if carried into practical effect, would furnish an example to the world which would greatly aid the judicial process in its struggle with political force.

Project 17, consisting of twenty-four articles, constitutes a code of extradition. It was drafted by the Commission of Jurists at the 1912 Rio Janeiro Conference, and is one of the most satisfactory of the projects to be submitted to the 1927 conference. It is inclusive, deals with the difficult, disputed and doubtful questions which experience has disclosed, involves few new departures and seems just to all parties concerned. It provides that extradition shall be obligatory (Art. 1). Without suggesting a list of the crimes for which extradition shall be granted, it provides that crimes punishable in both demanding and requested states by not less than two years' imprisonment should alone be dealt with, provided the statute of limitations shall not have run in either country (Art. 2). Constructive presence within the demanding state shall justify surrender only if the state of refuge would also punish such offense if committed outside its territory (Art. 3). This is designed presumably to deal with such cases as Rex *v.* Godfrey (1922, K. B.) 39 T. L. R., 5, 32 Yale Law Journal, 287, in which matter not all countries pursue the same practice. Extradition is to be denied if the accused has already been tried or pardoned in the country of refuge for the same offense, or if he is charged with a political offense (assassination of heads of states and acts of anarchy under the laws of both nations, excepted). The state of refuge is to be the judge of the issue of the political nature of the offense. The surrender of military deserters is optional (Art. 4).

Article 5 provides that the nationality of the fugitive is "never" to be a hindrance to extradition, but the meaning of this seems obscure. Is the state merely privileged or is it thereby obliged to surrender its own citizens? That it is not obliged may be inferable from the second sentence which provides that a state refusing to surrender its citizen must try him locally.

Surrender may be delayed so long as the fugitive "is under penal prosecu-

tion for another cause" in the country of refuge (Art. 6). This probably means subject to penal control, including imprisonment, but excludes civil obligations to the requested state (Art. 7). Inasmuch as some countries do not permit the death penalty, it is provided that if the country of refuge so demands, the death penalty must be commuted "to that next below" (Art. 8). Possibly this means life imprisonment.

The surrendered person cannot be tried for any other offense than that for which he was extradited (Rauscher case), unless the nation of refuge, not the individual, has consented, or unless it is an offense connected therewith and "based on the same evidence" (Art. 9). This is a variation from the American practice under extradition treaties. By Article 10 the individual may waive the immunity from trial for another offense, or if released, becomes subject to such trial if he remains in the country more than a month or commits a new offense subsequent to extradition. The demanding nation shall not surrender the fugitive, without the consent of the requested nation, to any third state, except under the limitations of Article 10 (Art. 11). Article 12 provides for the order of preference when several states demand the same offender. If for the same act, the territorial rather than the national state is preferred; if for a different act, the most serious, in the view of the requested state, is the preferred crime for surrender. In the case of acts of equal gravity, the first demand for surrender is preferred; if all the requests are made on the same date, the crime first committed is preferred; if committed at the same time, the state of refuge has the option in preference. In all cases of different acts, reëxtradition to other countries may be stipulated.

Articles 13 and following deal with the procedure, forms and costs of and evidence necessary for effecting extradition. Article 13 provides for the evidence of the commission of or conviction for an offense which the demanding state must supply, through diplomatic or other governmental channels. Article 14 provides for emergency arrests on telegraphic request, with the formal request and evidence to follow within a period not exceeding two months. Article 15 provides for the return for correction of irregular or defective documents. The propriety of surrender, the weighing of evidence and the determination of formalities are to be judged by the authorities of the state of refuge. The individual is to have available *habeas corpus* or *amparo* and may ask release on bail, under conditions set by the state of refuge (Art. 16).

Article 17 provides for the requisition of articles in the possession of the refugee or in the state of refuge which may have been used in the commission of the act for which extradition is claimed or which may otherwise serve as evidence. Third party possessors of such articles or evidence must be duly heard before they can be deprived of them.

Agents of the requested nation shall take the fugitive to the frontier or port, where he is to be delivered to the agents of the demanding nation

(Art. 18). This is doubtless to avoid such kidnapping cases as Ker *v.* Illinois, 119 U. S. 436. Article 19 regulates transit through third countries, and Article 20 provides that each nation shall bear the expenses incurred in its own territory, but transportation through third countries or by sea shall be borne by the demanding nation. The final sentence of a person tried after extradition shall be communicated by the demanding to the requested nation (Art. 21). Extradition may be requested of alleged anarchists, if both countries punish acts of anarchy, and though the penalty is less than two years (Art. 22). If, after surrender to the diplomatic or consular officer of the demanding nation, the officer fails to send the accused to his destination within twenty days he may be restored to liberty without subjection to rearrest (Art. 23). Existing and new treaties not contrary to the proposed convention are to be deemed valid (Art. 24).

On the whole, the convention is well conceived to effect uniformity in the extradition procedure of the American continent.

EDWIN M. BORCHARD.

THE AMERICAN INSTITUTE CODIFICATIONS ON TRANSIT BY LAND, WATERWAYS AND AIR

Freedom of Transit

Project No. 18 of the series of conventions submitted to the Governing Board of the Pan American Union bears the title "Freedom of Transit." The preamble declares that the maintenance of freedom of communications and of transit is "an appropriate means of developing coöperation between nations without prejudice to their rights of sovereignty." Freedom of transit is indeed a vitally important aid in the promotion of peaceful relations. Although this may be peculiarly true of the nations of Europe by reason of the numerous land boundaries and the high proportion of population to territory, it is by no means inapplicable to conditions in other parts of the world. It has come to have increasing significance between the American Republics owing to the growth of population and trade, and because science is constantly speeding up the means of communication and transportation.

Project No. 18 has been adapted from the statute annexed to the convention signed at Barcelona, April 20, 1921, by forty nations, including eleven of the Latin American Republics.[1] The Barcelona Statute contains several articles not found in the American Project. Thus Article 10 excepts prior inconsistent agreements and conventions, but provides for their subsequent adoption "so far as the geographical, economic or technical circumstances of the countries or areas concerned allow." The contracting states agree by the same article not to conclude in future, treaties which are inconsistent with the provisions of the Statute, except when circumstances justify exceptional deviations. Regional understandings consistent with the principle

[1] See Supplement to this JOURNAL, Vol. 18, pp. 118–127.

of the Statute are allowed. The Barcelona Statute also contains exceptional provisions applicable to devastated districts, colonies, dependencies, protectorates and detached settlements (Arts. 12, 14, 15). Finally the Statute provides that disputes which cannot be settled directly between the parties shall be referred either to arbitration or to the Permanent Court of International Justice (Art. 13). With these differences, Project 18 conforms closely to the Barcelona Statute.

The Barcelona Conference was called by the League of Nations for the purpose of concluding conventions which would comply with the provisions of Article 23 of the Covenant. By this article it is stipulated that "subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the members of the League of Nations . . . will make provision to secure and maintain freedom of communications and transit." The Statute (Art. 2) therefore lays it as a duty upon the contracting states to "facilitate free transit by rail or waterway or routes in use convenient for international transit." Project 18 (Art. 2) modifies the obligation by making it rest in the "measures of regulation of administration" which the American Republics may take in regard to transport. Evidently respect is thus intended to be shown for the system of public regulation (rather than public ownership) which still prevails as the ruling principle in many of the countries of the New World.

The guiding principle of the Project is that transit-traffic, whether of persons, baggage, goods or vessels, shall not be subject to special dues (Art. 3), and that tariffs shall be reasonable as regards both their rates and the method of their application, whatever may be the place of departure or destination of the traffic (Art. 4). The Project establishes the principle of reciprocity (Art. 6). It also contains exceptions in cases of "an emergency affecting the safety of the nation or the vital interests of the country" (Art. 7). The provisions shall continue in force in time of war so far as the rights and duties of belligerents and neutrals permit (Art. 8), but the Project does not assume to prescribe what these rights and duties shall be in respect to transit.

Should the Project ever materialize into a convention, it would seem necessary to have its actual operation under the surveillance of some technical body to insure the fair application of rates and conditions as part of a general scheme. Experience in this country teaches that even with the best intentions, the accomplishment of a nice balance in the scales of justice in matters of transit and transportation is a problem of great technical and scientific difficulty. Doubtless we should see established under the auspices of the Pan American Union, a body similar to the Advisory and Technical Committee under control of the League as contemplated by the Barcelona Conference, to advise on questions of transit and communications. Such a body would not have any direct administrative power, but would render opinions and recommend temporary measures to restore facilities of transit (see Art. 13).

Navigation of International Rivers

Project No. 19 of the American Institute of International Law is not intended to constitute a comprehensive regulation of the subject of international rivers, but is a declaration of general principles. It defines an international river to be "one whose navigable part crosses the territory of two or more nations or is a boundary between them" (Art. 1). It declares three general principles to be observed, *viz.*, that "international rivers shall be open in time of peace to the merchant vessels of the contracting republics" (Art. 2); that "the navigable tributaries of international rivers are subject in all respects to the same regulations as the rivers to which they are tributary" (Art. 4); and that any tolls for navigation of such rivers shall be expended only for the maintenance and improvement of their navigation in general (Art. 5). All other subject-matters are left to be regulated by special treaties affecting particular rivers (Art. 3).

The Project differs, therefore, materially from the Barcelona Statute on the Régime of Navigable Waterways of International Concern contained in the convention signed April 20, 1921.[2] The Barcelona Statute, with its accompanying protocol, deals with the various privileges and exemptions mutually accorded not only in respect to navigation of rivers, but of all "waterways of international concern," whether naturally navigable or not. It also deals with the use of ports and the control of works, the latter being placed to some extent under the supervision of an international commission. It also provides for complete equality of treatment in the application of customs duties in all ports situated on a navigable waterway of international concern. All these matters are omitted from the American Project. Four republics of the Pan American Union were among the original signers of the Barcelona Convention, and the acceptance of the American Project would not seem to be inconsistent with the régime contemplated by the Barcelona agreement. The scope of the latter is much wider and might serve as the detailed regulation mentioned in Article 3 of the American Project for those states willing to accept, in return for reciprocal advantages, the very comprehensive obligations imposed by the Barcelona agreement.

The American Project and the Barcelona Convention would crystallize by general agreement the principle of freedom of navigation on international rivers, proclaimed at the Congress of Vienna, which Bismarck, at the Conference of Berlin in 1884–1885, stated to be a "principle which has passed into international law, both in Europe and America."[3] Hitherto the principle, if such it may have been regarded, was applicable only to riparian states. Now all parties to the convention would share equally with the riparian states. It would therefore represent a great advance over prior practice because such rights have usually accrued only as the result of a peace

[2] See Supplement of this JOURNAL, Vol. 18, pp. 151–167.
[3] British Year Book of International Law, 1921–1922, p. 81.

treaty following upon some great war. Wholesome development of the principle of freedom of transit over land and waterways can result only by voluntary agreement in return for reciprocal advantages.

Aerial Navigation

Project No. 20 relating to Aerial Navigation has been adapted from the Convention for the Regulation of Aerial Navigation, signed at Paris, October 13, 1919.[4] It retains the provisions of the first thirty-six articles of that convention substantially *in haec verbis*, omitting a reference to colonies in Article 1, substituting the words "American Republics" for "high contracting states" wherever appropriate, and transferring the functions of the International Commission for Air Navigation to the Pan American Union (Art. 34). Article 36 of the convention, which provides for a reference of disputes to the Permanent Court of International Justice, is omitted from the Project. Articles 38 and 39 of the Convention are numbered, respectively, Articles 37 and 38 in the Project; and Articles 40 to 43, inclusive, of the Convention relating to matters which concern the League of Nations and dealing with adhesions and denunciations, are entirely omitted. The annexes to the Convention, so important to its operation in practise, are retained.

The writer has already commented at length upon the Paris Convention in this JOURNAL.[5] It remains only to say that some of the clauses of the Project will conflict with obligations under the Convention precisely because they are identical in both. Article 5, in both the Convention and the Project, prohibits the flight of an aircraft above the territory of a signatory state, except by special and temporary authorization, if the aircraft does not possess the nationality of another signatory. Accordingly, no American Republic, a party to the Paris Convention, could consistently accept the obligations of the Project. As several have already acceded to the Convention and others may wish to do so, it may become important to modify this clause. There seems to be no good reason why an American nation should not be a party to both, if indeed the Paris Convention is not to be accepted by all nations. Article 5 could be modified by prohibiting flight only to an aircraft which does not possess the nationality of an American Republic or of a signatory to the Paris Convention, under the condition of reciprocity. Without intrenching on matters of high state policy, we venture to believe that it is not intended to make freedom of air transit depend permanently upon membership in some particular union, be it the League of Nations or the Pan American Union.

ARTHUR K. KUHN.

[4] Supplement to this JOURNAL, Vol. 17, pp. 195–215.
[5] Vol. 14, pp. 369–381.

PROJECT OF THE AMERICAN INSTITUTE OF INTERNATIONAL LAW ON MARITIME NEUTRALITY (NO. 26)

This project is presented without commentary,[1] consequently its meaning must be gathered from the terms of the draft convention itself, with such aid as is afforded by the preamble. The latter sets forth "the maintenance of peace," "the safeguarding of commercial freedom" and "the relief of neutrals from the useless burdens and responsibilities under which they labor today" as the reasons for regulating maritime neutrality. "This new conception of neutrality," it considers to be required by "the solidarity uniting all the members of the community of nations," and it anticipates the possibility of agreements embodying this conception because of the "equal interest of all nations in having their rights in regard to neutrality respected." Whether that interest really is equal, even among the American nations, might be questioned, but apparently the draft convention assumes an equal interest among all nations of the world. In terms the convention itself applies only to the "American Republics," but as the neutral rights attributed to American republics profess to be valid against non-American belligerents, obviously they cannot vary very much from generally recognized international law. Doubtless for this reason the more radical proposals are appended to the draft convention as *voeux*.

Besides the preamble, the convention contains 29 articles in six sections, to which are appended four *voeux*. Most of the articles deal with the subjects covered by the XIII Hague Convention of 1907, with some modifications and additions drawn from the practice of neutrals during the World War, and subsequent conventions. The most radical innovations are the recognition of a duty of American Republics to remain neutral, the delegation of functions in enforcing neutrality to the Pan American Union, and *voeux* looking toward an extensive reduction of belligerent restrictions on neutral commerce.

Article I, which comprises the whole of Section I, is a "general declaration" as follows:

[1] Text in Special Supplement to this JOURNAL, Oct. 1926, Vol. 20, p. 361. Dr. James Brown Scott, commenting on the draft codes of the American Institute, deals very briefly with this project. He expresses the belief that it "states the enlightened practice of the American Republics before the last war, incorporating in its provision the experience had in that war, and quotes from Prof. José Matos, of Guatemala, who explains that changed conditions have made necessary a change in the rules of neutrality (Proc. Am. Soc. Int. Law, 1925, pp. 45–46). Dr. Antonio S. de Bustamente, of Cuba, contents himself with quoting Articles 1 and 2 of Project 26 as indicating its spirit. (*Ibid.*, 1926, p. 125.) Prof. J. L. Brierly, of England, sees no "serious modification of the law as commonly understood" with respect to the rights and duties of neutral states in the draft convention, while the *voeux* "ensuring the comfort and profit of the neutral trader" are "perhaps a natural corollary" to the general preamble of the code (Project 1, Art. 9), which "hopes that war has happily and forever vanished from the American Continent." (British Year Book of International Law, 1926, p. 17.)

> In case of war between two or more countries, the American Republics consider it a duty to remain neutral and to contribute to ending the dispute by the offer of good offices or mediation.
>
> The exercise of that right can never be considered by the parties as an unfriendly act.

Apparently the "right" referred to in the second paragraph is not that of remaining neutral, but of offering good offices or mediation thus conforming to Article 3, paragraph 3 of the I Hague Convention of 1907.

Modern writers usually treat neutrality, like war, as a question of fact rather than of law. If war exists, non-participants are neutral until they make war on some other state or some other state makes war on them, but in the absence of a special treaty establishing a status of permanent neutrality or prohibiting war under the circumstances, there is no legal obstacle to the occurrence of either of these events. Thus in the absence of special treaty, states have no right to remain neutral nor are they under any duty to remain neutral.[2]

Some writers, it is true, have referred to a right to remain neutral,[3] but apparently they have used the term loosely to mean that the policy of neutrality is not, in the absence of special treaty, illegal.[4] Some writers have even denied this. Mazzini characterized "neutrality in a war of principle" as "the negation of the common law of nations,"[5] and VanVollenhoven described Vattel's doctrine that third states are not entitled to judge of the justice of wars as "the absolute negation of the law of nations."[6] Like Grotius,[7] these writers have merely insisted that the family of nations, like any other community, should apply Solon's maxim that "wrongs done to individuals should be resented and redressed by the other members of the community, as promptly and as vigorously as if they themselves were personal sufferers."[8] Where a war originates in injustice by one of the belligerents,

[2] Wright, "Changes in the Conception of War," this JOURNAL, Vol. 18, p. 756 *et seq.*

[3] Wheaton, Elements of International Law, 8th ed. (Dana), 1866, p. 509. Scott calls this right a "recent doctrine." (Proc. Am. Soc. Int. Law, 1925, p. 45.)

[4] The distinction lies in the fact that termination of neutrality by war does not necessarily violate international law, which would necessarily be the case if neutrality were a "right."

[5] Bolton King, Mazzini (Everyman's ed.), p. 305. See also Beer, The English Speaking Peoples, 1917, p. 134.

[6] VanVollenhoven, The Three Stages of the Law of Nations, The Hague, 1919, p. 31.

[7] Grotius, *De Jure Belli Ac Pacis*, I, c. 5, sec. 2; II, c. 20, sec. 40, pars. 1, 4; c. 25, sec. 6.

[8] Plutarch, Solon, Sec. 18. See also Creasy, First Platform of International Law, London, 1876, p. 44; Amos, Jurisprudence, London, 1872, pp. 411, 456; Wright, "Effects of the League of Nations Covenant," Am. Pol. Sci. Rev., 1919, Vol. 13, p. 557; "Outlawry of War," this JOURNAL, Vol. 19, p. 92. This conception appears to be embodied in the fifth declaration of the rights and duties of nations of the American Institute of International Law (1916), contained in the seventh draft project, which entitles every nation to have its rights not only "respected" but also "protected" by all other nations, and in Article 21 of the fourth project which recognizes the "right" (but not the duty) of American Republics "to protest against violations of international law even if those violations do not directly affect them." By the preceding article, however, the "observance of international law rests principally

neutrality would hardly conform to this doctrine. The League of Nations Covenant embodies this point of view and forbids neutrality to the members of the League in the presence of war arising from specified types of aggression.[9] Consequently, for members of the League, which includes many Latin American countries, ratification of the article now under consideration would seem contrary to the "solemn undertaking" of Article 20 of the Covenant "not hereafter to enter into any engagements inconsistent with the terms thereof."[10]

If the policy of neutrality has been subjected to such severe criticism and treaty modification, what can be said of a "duty" to remain neutral? Wars of aggression are, it is true, contrary in principle to international law and there consequently is a duty to abstain from them,[11] but an unqualified duty to remain neutral would seem to forbid under any circumstances any use of force against belligerents which could be construed as an act of war.[12] Strictly interpreted, a neutral would not be entitled to use force, even for self-defense, though doubtless this would be implied as it has for states permanently neutralized by convention.[13] But a duty to remain neutral would seem to preclude the use of force to assist other neutrals, though even Vattel, whom VanVollenhoven accuses of perverting international law

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upon the honor of the American Republics under the sanction of public opinion," though Project 20 authorizes "coercitive" measures of redress like reprisals, hostile embargo and pacific blockade. This JOURNAL, Spec. Supp., Vol. 20, pp. 307, 312, 382, and Scott, Proc. Am. Soc. Int. Law, 1925, pp. 20–21, 45.

[9] Covenant, Arts. 10, 16; Wright, Am. Pol. Sci. Rev., Vol. 13, p. 563; League of Nations Official Journal, Vol. 1, p. 57.

[10] Switzerland's status of neutrality was recognized as a special exception by Art. 435 of the Treaty of Versailles and by a resolution of the League of Nations Council, Feb. 13, 1920 (Off. Journ. Vol. 1, p. 57). The permanent neutrality of Belgium and Luxemburg was terminated by the Treaty of Versailles (Arts. 31, 40), and Germany's request for a relaxation of Covenant obligations in view of her disarmament was not explicitly granted on her admission to the League. See collective note to Germany at Locarno, Oct. 16, 1925, this JOURNAL, Supplement, Vol. 20, p. 32. Some of the neutrality treaties made in Europe since the war seem to conflict with the Covenant. See Post-War European Treaties, Foreign Policy Association Information Service, Vol. 2, No. 16, p. 185; De Visscher, "The Stabilization of Europe," p. 111, and debate in United States Senate on effect of Article 20 of the Covenant, Cong. Rec., Jan. 14, 1926, Vol. 67 (daily ed.), p. 1665.

[11] Wright, this JOURNAL, Vol. 18, p. 756. This seems to have been the limit of Washington's meaning when he said in the farewell address: "The duty of holding a neutral conduct may be inferred, without anything more, from the obligation which justice and humanity impose on every nation in cases in which it is free to act to maintain inviolate the relation of peace and amity toward other nations."

[12] See this JOURNAL, Vol. 18, pp. 541–542, especially footnotes 21 and 22, and Scott, Proc. Am. Soc. Int. Law, 1925, p. 45.

[13] Wright, this JOURNAL, Vol. 19, p. 90; Fenwick, International Law, p. 87; Garner, International Law and the World War, Vol. 2, p. 210; Belgian note, Aug. 3, 1914, and Swiss declaration of neutrality, Dec. 12, 1917, Naval War College, International Law Documents, 1917, pp. 53, 212.

with his doctrine of the irresponsibility of sovereignties, endorses such action.[14]

The use of force as a preventive and remedial agency when other means fail is so well recognized in international law,[15] and has been so frequently exercised by neutrals in controversies with belligerents,[16] that its suggested elimination as a weapon for American nations against belligerents should be carefully considered before it is accepted.

Where states have adopted a policy of neutrality, they appear to have done so (1) because they felt little or no interest in the outcome of a foreign war, (2) because they believed their own intervention would not affect the outcome, or (3) because they thought they would lose more by participation in the war than they would gain by the success of the side they favored. Writers and even statesmen have sometimes advocated neutrality (4) on grounds of the high moral value of non-resistance. Can any of these grounds support a general American policy of neutrality and more particularly a policy for the United States under present conditions?

1. Washington pursued a policy of neutrality in European wars and later justified it on the ground that with "our detached and distant situation" the interests of Europe have for us "none or a very remote relation" and "the causes of her controversies are essentially foreign to our concerns." Monroe, however, later pointed out that "in regard to the American continents, circumstances are eminently and conspicuously different," and his successors have on occasion intervened in Latin American controversies. Roosevelt even asserted the policy of exercising an international police power in the Caribbean.[17] A policy of intervention has similarly developed in the Far East until today the United States is committed to a quasi-guarantee of the insular possessions of Great Britain, France and Japan in the Pacific. Even with regard to Europe, Washington's theory was weakened by the state of actual if not formal war with France shortly after his farewell address, shaken by the War of 1812, and shattered by American entry into the World War with President Wilson's announcement that "we had seen the last of neutrality in such circumstances."

To an ever-increasing extent the United States has found that it is not un-

[14] Vattel, *Le Droit des gens, Preliminaires*, Sec. 22; *infra*, note 15.

[15] Stowell, Intervention in International Law, pp. vi, 1; Wright, this JOURNAL, Vol. 19, pp. 89–96; VanVollenhoven, *op. cit.*, p. 10 *et. seq.;* Root, this JOURNAL, Vol. 10, pp. 9, 217; *supra*, note 8.

[16] The United States has twice resorted to war for the avowed purpose of defending its neutral rights against belligerents, and once to reprisals. Other neutrals have done the same on occasion, and neutrals have frequently proclaimed their right and intention to use force in behalf of neutral rights. See Armed Neutralities of 1780 and 1800 (Carnegie Endowment for International Peace, Division of International Law, Pamphlets 27, 28), and declarations of Argentina, Cuga, Peru, and Uruguay during the World War, Nav. War Col., Int. Law Docs., 1917, pp. 37, 78, 198, 216, 249.

[17] Annual message to Congress, Dec. 6, 1904.

interested in the results of foreign contests, and Latin American countries by joining the League of Nations have formally signified their interest in controversies or conditions anywhere that may result in war (Arts. 11, 16).[18] With the present interpenetration of the interests of nations through commerce, finance, immigration, travel and news, few if any nations are in fact unaffected by wars, and where interest exists experience shows that participation is likely if the war goes on for any length of time. "Neutrality," said President Wilson on April 2, 1917, "is no longer feasible or desirable where the peace of the world is involved and the freedom of its peoples." Not neutrality, but responsibility of all states to enforce international law and to coöperate in world progress is the tendency suggested by present international relations.

2. If an American policy of neutrality cannot be justified by isolation, can it be justified by impotence? Small states of Europe, such as Switzerland, Belgium, and Luxemburg, have pursued or had forced upon them a policy of permanent and guaranteed neutrality perhaps for this reason. Their strength would be so insignificant in a contest between their titanic neighbors that it could seldom affect the result. The United States has never professed belief in such a fatalistic doctrine. Advocating an international police force, President Roosevelt said in his annual message of 1904, "If the great civilized nations of the present day should completely disarm, the result would mean an immediate recrudescence of barbarism in one form or another." And on May 26, 1917, President Wilson thought "we could afford to pour out blood and treasure to secure the common life against the aggression of autocratic and self-pleasing power."

The doctrine that resistance to evil is useless has had more advocates in international relations, it is true, than in individual relations, but in neither has it commanded the confidence of those in responsible control of great states. Even Switzerland and Belgium armed in defence before 1914,[19] and the latter repudiated neutralization in the Treaty of Versailles (Art. 31).

3. A careful calculation of national advantage in the circumstances has probably been the usual process by which states have decided on war or neutrality, but such calculations can hardly support a permanent policy. They depend on the relative power and position of the particular belligerents and neutrals. Powerful states have generally considered it advisable to intervene in wars between weak belligerents where the outcome would affect their interests. In such cases the losses from war are slight and the profits from

[18] Venezuela recognized this interest in October, 1914, by suggesting a conference of neutral nations to mediate in the war on the following, among other, grounds: "Although neutrality has never signified an attitude of indifference, today less than ever can it have this signification. The universal economic losses, probably resulting from the actual war of Europe, if the duration is to be, as there is reason to fear, indefinite, cannot be a matter of indifference to neutral nations." Nav. War Col., Int. Law Docs., 1916, p. 128.

[19] *Supra*, note 13.

controlling the peace negotiations great. The great European Powers have seldom been neutral in Balkan wars or the United States in Caribbean and Central American wars. If expediency is the guide, neutrality is not always the wisest policy.[20]

4. Lastly, we may inquire whether moral suasion, the tender of good offices and mediation, is, in the long run, more effective than coercion in restoring a satisfactory peace. International law doubtless profits by the availability of peaceful means of settlement, by the scientific accommodation of its rules and principles to existing interests, and by the focusing of informed public opinion on international delinquencies, but can these methods do away with the occasional need for force? It is to be hoped that with the progress of international organization they will tend to do so. Recent European experience, however, shows that a sense of security cannot be built up without pledges of military assistance against aggression. "One cannot hope to convert instantly to the idea of the omnipotence of moral ideas, nations which in victory and in defeat have so often witnessed the triumph of brutal force."[21] While DeVisscher was here speaking of Europe, one will be convinced that the same conditions exist in other continents by reflecting on the history of Mexico, Colombia, Peru, China, and Persia. Force has had a large share in making recent as well as more distant history, and until it is organized on a world basis states will not be convinced of the sufficiency of institutions supported only by law or morals. Pacifism has not, in fact, been a characteristic of either the United States or other American nations, and it is worth recalling that William Penn, who professed non-resistance in the relations of man to man, recommended in his plan for a League of Nations that if any sovereignty violated the covenant "all the other sovereignties uniting their forces should compel its submission."[22]

[20] Machiavelli thought it not only "more frank and princely" but also "more profitable" to declare war than "to stand neuter" (The Prince, Chap. 21), and though Grotius favored peace, he thought "when we have right on our side, and, what is of greatest consequence, strength also, it is time for war" (*op. cit.*, II, c. 24, sec. 9). Washington emphasized "the inducements of interest" for observing neutrality, in order to "gain time . . . to mature our yet recent institutions," and looked forward to "the period not far off when we may defy material injury from external annoyance . . . and choose peace or war as our interests guided by justice shall counsel." (Farewell address, Sept. 17, 1796.) Secretary of State Hughes said: "We are not isolated and could not be. . . . It is not that our interests were not affected injuriously by such controversies. . . . But, it was, despite such injuries, the abiding conviction that we had better bear these ills than suffer the greater evils which would follow the sacrifice of our independent position." (Address, Nov. 30, 1923, Current History, Jan. 1924, pp. 576, 579.)

[21] DeVisscher, *op. cit.*, pp. 80, 82; Wright, this JOURNAL, Vol. 19, p. 97–101; and debate between Senators Borah, Lenroot and Walsh, Cong. Rec., Jan. 22, 1926, Vol. 67 (daily ed.), pp. 2235, 2240, 2242.

[22] Penn, Essay Toward the Present and Future Peace of Europe by the Establishment of an European Dyet, Parliament or Estates, Sec. 4, par. 5, summarized in Darby, International Tribunals, 1904, p. 57.

The confidence in neutrality expressed in the first article is given further sanction in the second, which requires the "Governing Board of the Pan American Union immediately upon the declaration of war to meet to examine the common interest of the American Republics," with a view "to insuring respect for the rights of neutrals and particularly the freedom of commerce and navigation." This suggestion recalls a proposal to similar effect made by Venezuela in 1914[23] and the efforts of various peace organizations to bring about a meeting of European neutrals in 1915,[24] though these had the major object of restoring peace rather than protecting neutral rights. This proposal, which doubtless accords with the spirit and purpose of the Pan American Union, would seem more suitable for incorporation in its statute than in a general convention on maritime neutrality. The same observation is applicable to Article 29, which authorizes the Pan American Union to appoint commissions to observe how the belligerents conform to the law and customs of war, and to protest violations "in the name of the Republics of the New World."[25] Such protests, it is to be feared, might lack in effectiveness if the belligerents were convinced that the American States would scrupulously observe the obligation of article one of the present convention.

The remainder of the convention outlines the rights and duties of neutrals and belligerents along more traditional lines. Section III on "Freedom of commerce in time of war" contains only Article 3, which reproduces Article I of the Washington Convention on Submarines and Poison Gases (1922) with a few verbal changes in the English text.[26] This article is designed to prevent the sinking of merchant vessels without warning and was considered by the signatories of the Washington treaty as declaratory of existing international law.

More radical suggestions with regard to the freedom of commerce in time of war are included in the *voeux*, of which the second forbids commercial blockades, the third assures the inviolability of private property at sea except contraband of war, and the fourth professes to abolish the right of search. In reality it imposes a liability to pay damages upon belligerent war vessels which search neutral vessels provided with visés by neutral governments and find no contraband. All of these proposals, especially the second, have been much discussed and there appears to be little inclination on the part of strong naval states to accept them. Even the United States gave up its century-

[23] Nav. War Col., Int. Law Docs., 1916, pp. 125–129.

[24] Addams, Peace and Bread, 1922; Women at the Hague, 1916.

[25] Project No. 7 of the American Institute, a formal statute for the Pan American Union, authorizes the Union to "see that no nation interferes with the most absolute freedom of navigation even indirectly." This JOURNAL, Spec. Supp., 1926, Vol. 20, p. 315.

[26] This draft says "a merchant ship must not be rendered unseaworthy until the crew and passengers have been first placed in safety," while the Washington treaty said "must not be destroyed unless . . . ," etc.

old campaign in favor of the immunity of private property at sea after it had failed to get general agreement in the Hague Conference of 1907.[27]

Section IV (Arts. 4–12) deals with "Rights and duties of belligerents," and Section V (Arts. 13–26) with "Rights and duties of neutrals." This division is confusing, as generally the right of a belligerent is the duty of a neutral, and *vice versa*. Thus many of the articles in Section IV might with equal propriety go in Section V, for instance, in the former we find provisions restricting the use of neutral ports by belligerent war vessels (Art. 7), but similar provisions with respect to prizes are put in Section V (Arts. 16, 17). Each restriction involves both a belligerent duty and a neutral right and, in connection with Article 22, a neutral duty. The XIII Hague Convention of 1907, which is closely followed in many of these articles, made no such division, and the present convention would be clearer if it were eliminated.

These two sections reproduce Articles 1, 5, 6, 7, 8, 13, 17, 18, 21, 22, 24, and 25 of the XIII Hague Convention of 1907 and Articles 4 and 6 of the V Hague Convention of 1907. Article 23 of the XIII Hague Convention, permitting sequestration of prizes in neutral ports, was not ratified by the United States, was not recognized in the case of the *Appam*, and is not reproduced here. The Hague provisions permitting belligerent warships innocent passage of territorial waters and sojourn in neutral ports for fuel and supplies are also eliminated, and the first *voeu* proposes to refuse belligerent warships all access to ports, roadsteads and territorial waters of neutral American republics except in case of duly proved *force majeure*. During the war the Netherlands enforced a similar regulation,[28] and other neutrals prohibited access to belligerent submarines.[29]

The convention follows the practice of many neutrals during the war[30] in assimilating auxiliaries to warships, and goes perhaps further than any in so assimilating belligerent or "neutral" merchant ships which render regular or "occasional" assistance to belligerent warships (Art. 6).[31] During the war many neutrals imposed regulations on the departure of merchant vessels in

[27] See Nav. War Col., Int. Law Docs., 1905, pp. 1–20, 1913, pp. 113–131.

[28] Netherlands, Regulation of Aug. 5, 1914, Arts. 2, 4. *Ibid.*, 1916, p. 62.

[29] Norway, Oct. 13, 1916, Jan. 30, 1917; Spain, June 29, 1917; Sweden, July 19, 1916. *Ibid.*, 1917, pp. 194, 214, 215.

[30] Netherlands, Aug. 5, 1914; United States for Panama Canal Zone, Nov. 13, 1914, Rule 2; Argentina, Aug. 17, 1914, Art. 4, Dec. 26, 1914; Dominican Republic, Jan. 5, 1915; Ecuador, Jan. 18, 1917, Art. 1. Nav. War Col., Int. Law Docs., 1916, pp. 62, 97; 1917, pp. 23, 30, 86; 1918, p. 45. Great Britain proposed such a provision at the Second Hague Conference (1907), but objection was made on the ground that the competence of the conference did not extend to unneutral service here involved. See Scott, Reports to the Hague Conferences, p. 614; Higgins, Hague Peace Conferences, p. 317.

[31] Armed merchant vessels, however, are not assimilated to war vessels, as they were by the Netherlands during the World War. See Hall, International Law, 8th ed. (Higgins), p. 630, which supports the British protest against the Dutch practice.

order to prevent their supplying belligerent war vessels on the high seas.[32] Articles 8 to 10 authorize such restrictions and require the communication of information about suspected merchant ships to the Pan American Union. Article 11 embodies the Chilean note of March 15, 1915,[33] admitting as merchant vessels auxiliaries which have been reconverted under specified conditions.

Article 12 authorizes neutral regulation of belligerent aircraft transit as did the draft Hague regulations of 1922 (Art. 12) and the regulations of Switzerland and other neutral states during the war.[34]

The prohibition of loans to belligerents by American Governments required by Article 14 was not specified in the Hague Convention, but might be implied from the XIII Hague Convention (Art. 6), and is a generally recognized obligation.[35] The present convention imposes no obligation to prevent loans by private individuals of neutral states, though in the early days of the World War the United States expressed some disapproval of such loans.[36]

The seventh article of the V and XIII Hague Conventions of 1907, allowing trade in arms and ammunition from neutral territory, is retained (Art. 19). Such trade from the United States was the subject of serious complaint by the Central Powers during the World War and, though the United States defended it, some writers have expressed the opinion that under certain conditions it may constitute the territory a base of operations.[37]

The usually recognized duty to prevent recruiting in neutral territory (V Hague, 1907, Art. 4) is extended to the summoning to the flag of belligerent nationals in neutral territory "under threat of accusing them of desertion." The neutral would find it difficult to prevent the dissemination of such threats.[38] On the other hand, the neutral obligation of the V Hague Convention of 1907 (Art. 6), is perhaps narrowed by allowing voluntary departure of belligerent nationals "even simultaneously and in great numbers" (Art. 20).

Neutrals are authorized to censor cables and telegraphs, as they often did

[32] Ecuador, Nov. 28, 1914; United States, Sept. 19, 1914; Uruguay, Dec. 14, 1914; Argentina, Dec. 26, 1914. Nav. War Col., Int. Law Docs., 1916, pp. 57, 91, 116; 1917, p. 29.

[33] *Ibid.*, 1916, p. 28.

[34] Switzerland, Aug. 4, 1914, Art. 17, Aug. 10, 1914; United States for Panama Canal Zone, Nov. 13, 1914, Art. 15; Norway, Nov. 6, 1914, Art. 2. *Ibid.*, 1916, pp. 73, 77, 96; 1917, p. 192.

[35] Hyde, *op. cit.*, Vol. 2, p. 699.

[36] *Ibid.*, Vol. 2, p. 755; Garner, *op. cit.*, Vol. 2, p. 408 *et seq.*

[37] Hyde, International Law, Vol. 2, p. 754. For detailed discussion of the question, see Garner, *op. cit.*, Vol. 2, Chap. 35.

[38] The United States made no such attempt while neutral in the World War (Hyde, *op. cit.*, Vol. 2, p. 707). It would be an encroachment upon the usual authority of a state over its citizens if a belligerent were prohibited from punishing, by action against property or persons within its territory, its citizens abroad who failed to respond to a call to the colors.

during the war, but they are not required to (Art. 21). Thus the draft does not go beyond the V Hague Convention of 1907 (Art. 8). So also neutral obligations with regard to radio control are confined to preventing the erection of radio stations in their territory by belligerent governments (Arts. 5, 22). No obligation to censor existing private stations is imposed, though many neutrals actually established such a censorship during the war,[39] and Article 4 of the draft Hague Convention of 1922 obliges the neutral "to prevent the transmission of information destined for a belligerent concerning military forces or military operations."

Internment of vessels violating neutrality is authorized as in XIII Hague Convention of 1907 (Art. 24), and the American Republics are exempted from all responsibility for damages "except in case of gross mistake" (Art. 24). The provision for interning merchant vessels assimilated to warships makes necessary the provision of Article 25 for forwarding the innocent cargo of such vessels (Art. 25).

Article 26 authorizes the neutral government to retain "control and surveillance" of "temporary hospital ships" sent for rescue work on the high seas, and requires their "complete inviolability." This seems contrary to the X Hague Convention of 1907 which requires belligerent supervision of all hospital ships (Arts. 3, 22), except military hospital ships designated by the proper marks (Arts. 1, 5). Article 26 also departs from the Hague Convention in requiring the liberation of wounded or shipwrecked rescued by such ships. The X Hague Convention (Arts. 13, 15) required persons rescued by neutral public authority to be interned. In World War practice persons rescued by private vessels and landed in neutral territory were liberated, but on the theory that any belligerent warship could have demanded their surrender on the high seas.[40]

The tendency of Sections IV and V is to enlarge the rights, but not the duty, of neutrals to impose restrictions for the defense of their neutrality. Some of the permissible restrictions, as those forbidding sojourn and innocent passage to belligerent warships and assimilated vessels, if put in effect would doubtless be considered by non-signatory belligerents contrary to their rights under customary international law.[41] On the other hand, the convention does not hold the neutral to the standard of duty in certain matters, such as radio control, which recent experience seems to indicate.[42]

Section VI provides for "the execution and sanction of the law of neu-

[39] Chile, Dec. 30, 1914; Colombia, Aug. 22, 1914, Sept. 1, 1914, Sept. 11, 1914; Cuba, Sept. 24, 1914; Guatemala, Sept. 1, 1914; Nicaragua, Dec. 5, 1914; Switzerland, Aug. 4, 1914, Art. 14; United States, Aug. 5, 1914; Uruguay, Sept. 1, 1914; Venezuela, Aug. 26, 1914. Nav. War Col., Int. Law Docs., 1916, pp. 24, 36–38, 49, 58, 64, 73, 87, 110, 124–125.

[40] Hall, International Law, 8th ed. (Higgins), p. 480; Garner, *op. cit.*, Vol. 2, p. 428.

[41] Hall, *op. cit.*, pp. 198–199. Dutch restrictions of this character were protested by belligerents. Garner, *op. cit.*, Vol. 2, p. 429.

[42] Belligerents protested to Colombia and Ecuador on the inadequacy of radio control. Garner, *op. cit.*, Vol. 2, pp. 413–414.

trality and of belligerency." Article 27 incorporates the IV Hague Convention (Art. 3), holding a belligerent liable to make compensation for violations of the convention. No such liability is specified for neutral infractions, though on the principle of the Alabama award it seems to exist under general international law. Article 28 requires the authorities of each neutral American Republic to see that neutral rights and duties and accepted recommendations of the Pan American Union are observed on their territory and to settle provisionally urgent controversies with belligerents. Article 29, as already noted, authorizes the Pan American Union to protest violations "in the name of the Republics of the new world," but apparently both the Union and the nations themselves are barred by Article I of this convention from doing anything further than protest.

The convention is a loosely drafted conglomerate of existing conventional provisions, World War practice, and new ideas; thus it is subject to much criticism of detail and arrangement. Its most original contribution, the principle of assuring peace through neutrality and an extension of neutral rights, is of doubtful value. International law to be observed must be based on actual conditions and must give consideration to the interests of all those concerned. The American states alone cannot alter the international law binding outside states without the latter's consent, nor can they hope to influence the development of international law unless they are willing to assume responsibility for its enforcement.

QUINCY WRIGHT.

PROJECT NO. 27, PACIFIC SETTLEMENT, AND PROJECT NO. 28, PAN AMERICAN COURT OF JUSTICE, OF THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

As pointed out by Dr. Scott, President of the American Institute of International law, in transmitting the projects of the American Institute to Mr. Hughes, then Secretary of State of the United States and Chairman of the Governing Board of the Pan American Union, and by Mr. Hughes in laying the projects before the Governing Board of the Union, the members of the American Institute "were a unit in believing that the law of war should find no place in the relations of the American Republics."[1] Projects No. 27, Pacific Settlement, and No. 28, Pan American Court of Justice, are framed upon this principle.

The preamble of the Project for Pacific Settlement provides that:

[1] Remarks of Honorable Charles E. Hughes, Secretary of State of the United States, as Chairman of the Governing Board of the Pan American Union, at a special meeting of the Governing Board held on Monday, March 2, 1925, in laying the Projects of Conventions prepared by the American Institute of International Law before the Governing Board of the Pan American Union, Special Supplement to this JOURNAL, October, 1926 (Vol. 20), p. 279 at 281; see also letter of Dr. James Brown Scott, President of the American Institute of International Law, dated March 2, 1925, transmitting the Projects of Conventions to the Secretary of State, *ibid.*, p. 284 at 285.

> The American Republics in order to conserve the peace upon which their civilization depends, and to avert war which menaces it, agree to have recourse for the settlement of all disputes between them, when direct negotiations have failed, to the measures regulated in the present convention.[2]

This is no less than a proposal to outlaw war so far as the American continents are concerned. The measures which it is proposed to substitute for war are: (1) good offices and mediation; (2) commissions of inquiry; (3) conciliation; (4) friendly composition; (5) arbitration, and (6) the judicial power. (Article 1.)

Good Offices and Mediation. The provisions of the proposed convention as respects good offices and mediation are taken from Part II of The Hague Convention of 1907 for the Pacific Settlement of International Disputes, omitting the second paragraph of Hague Article 3 and Hague Articles 7 and 8. The omitted portions relate to the right to offer good offices or mediation even during the course of hostilities; to the effect of mediation upon mobilization and military operations; and to a special form of mediation through the appointment of international "seconds." This latter plan, which was the cherished invention of the late Frederick W. Holls, has never been resorted to in actual practice. It smacks of the conception of nations as international duelists[3] and the last paragraph contemplates "a definite rupture of pacific relations." All these Hague provisions are therefore logically omitted from a convention which does not recognize the legal possibility of war.

Commissions of Inquiry. The provisions with respect to commissions of inquiry are adapted from the convention adopted by the Fifth International Conference of American States of 1923. They provide for a sweeping reference of "all controversies . . . which it has been impossible to settle through diplomatic channels, or to submit to arbitration in accordance with existing treaties" (Article 7), or "cases in which the circumstances of the fact render all negotiations impossible and there is imminent danger of an armed conflict between the parties" (Article 8). The commission of inquiry provided for is to be constituted *ad hoc* of five members, two selected by each party in interest (only one of whom shall be a national) and a fifth by agreement of those so appointed with a veto power in each government, and elaborate provisions in case no agreement is reached for appointment by the President of an American Republic who in turn is to be selected by lot from a panel of six Presidents, three nominated by each party (Article 10).

The commission is empowered to "fix the status in which the parties must remain, in order that the situation may not be aggravated and matters may remain in *statu quo* pending the rendering of the report by the commis-

[2] Project No. 27, Pacific Settlement, Special Supplement to this JOURNAL, October, 1926 (Vol. 20), p. 368.

[3] See Holls, The Peace Conference at The Hague, pp. 196–203.

sion" (Article 15). The decisions of the commission and its final report "shall be agreed to by the majority of its members" (Article 10), but they "will not have the value or force of judicial decisions or arbitral awards" (Article 17). Once the report is rendered, six months time is available for renewed negotiations, after which the parties shall "recover entire liberty of action to proceed as their interests may dictate" (Article 18). This, however, in view of the preamble, should not mean that they are at liberty to go to war.[4] It should mean the election of some of the other measures substituted for war, and a technical construction might lead to the conclusion that diplomatic negotiations and arbitration had already been eliminated, leaving only good offices and mediation, conciliation, friendly composition and, perhaps, resort to the judicial power available. Doubtless the real intention of the convention is, however, to leave the parties free at all times to avail themselves of any of the measures to be substituted for war.

Query, whether the provisions of the project with respect to commissions of inquiry would not gain by revision along the lines of the simpler provisions of the treaties for the advancement of peace (the so-called Bryan Treaties) which the United States has celebrated with most of the Republics of the two Americas, or of the equally elaborate but in some respects more practical unified convention establishing commissions of inquiry between the United States and the Central American Republics, of February 7, 1923.[5]

Conciliation and Friendly Composition. Article 19 provides for resort by any party on a "question endangering the peace of any of the American Republics" to the Governing Board of the Pan American Union as a Council of Conciliation. It further provides that "the interested Republics shall refrain from all direct intercourse until the Governing Board may have decided the nature and form of its recommendation." No time limit is fixed for the action of the Board. By Article 20 provision is made for reference of "any question which has not been resolved by any of the methods stipulated in the present convention . . . at the request of all the parties . . . to the Chief Executive of any one of the American Republics or to any person possessing the confidence" of the parties as *amiable compositeur*. Under this article not only must all the parties agree to the reference, but they must "state the terms of the question and the procedure to be followed by them and by the friendly compositor" in a special agreement. This

[4] It should be noted, however, that Article 7 provides that "in case of dispute none of the parties shall begin mobilization or concentration of troops on the frontier of the other, nor engage in any hostile act or preparation for hostilities from the time steps are taken to convene the commission until the said commission has rendered its report, or until the expiration of the time provided for in Article 18." Is the implication of this provision quite consistent with the spirit of the preamble? Is not Article 15, which provides for the maintenance of the *status quo*, sufficient?

[5] U. S. Treaty Series, No. 717; supplement to this JOURNAL, Vol. 17 (1923), p. 108.

would seem to be a suggestive and useful provision. It may be recalled that the Alsop case was successfully disposed of by just such a reference on the part of the United States and Chile to His Majesty the King of Great Britain as *amiable compositeur*.[6]

Arbitration. Part VI of the proposed convention is entitled "Arbitration." It covers resort both to the Hague Court of Arbitration, the Permanent Court of International Justice and "any other court of justice which may be constituted for this purpose by the American Republics." (Article 26). It is submitted that this grouping of the Hague Court of Arbitration and the Permanent Court of International Justice under the common head of "Arbitration" is useful as an implied assertion that arbitration is a judicial remedy and that both courts, while differing in their composition and procedure, have one object, namely, the attainment of justice according to law. It is believed that there is no difference in kind between the Hague Court of Arbitration and the Permanent Court of International Justice. Whatever difference there may prove to be in practice is a matter of degree due to the improvement of the instrumentality which administers justice according to law.

However, Article 21 of the proposed draft retains, unfortunately it would seem, the provision of the Hague Article 37 that "International arbitration has for its object the settlement of questions between states by judges of their own choice and on the basis of respect for law." It is believed that if arbitration is a judicial remedy, the time has come for the removal of a long-standing ambiguity by amending the words "on the basis of respect for law" to read "in accordance with law" or by substituting other words unmistakably to that effect.

Articles 21, 22 and 23 of the proposed convention reproduce Hague Articles 37 and 39. Articles 24 and 25 practically incorporate by reference the provisions of the Hague Pacific Settlement Convention of 1907, thus providing for continued resort to arbitration before the Hague Court, if the parties so elect—a most sensible and prudent arrangement. Article 26 provides as follows:

> In differences which the parties desire to have decided by a court of justice, resort may be had to the Permanent Court of International Justice established at The Hague, or to any other court of justice which may be constituted for this purpose by the American Republics.
>
> When the resort is to the Permanent Court of International Justice at The Hague, the procedure shall be in accordance with the statute of the said court.

Although it is not so stated, it would naturally follow that when resort is to be had to any court of justice constituted by the American Republics, procedure would be in accordance with the convention constituting that court.

[6] Protocol for the Arbitration of the Alsop Claim, December 1, 1909, Foreign Relations, 1910, p. 186; Treaties and Conventions, Vol. 3, p. 2508; this JOURNAL, Vol. 5 (1911), p. 1080.

Project No. 28. Pan American Court of Justice

This naturally leads up to Project 28, a separate project, which provides for a Pan American Court of Justice. This project is adapted from the project of the Advisory Committee of Jurists at The Hague as originally drafted in July, 1920, prior to the modifications made by the Council and the Assembly of the League of Nations in October and December, 1920.[7]

Appointment of Judges. In the nature of things it could not literally follow its model as respects the vital question as to the mode of appointment of the judges of the proposed court. It also fails to accept the underlying basis of the plan of the Hague Jurists. The Hague Jurists, like the members of our Federal Constitutional Convention before them, frankly recognize the impossibility of setting up a court in which all the constituent states should have separate and equal representation, and adopted the elective method, as the Convention of 1787 adopted the appointive method, of securing a court of a reasonable size whose members should owe their positions to the constituent body as a whole rather than to any particular state. The project for the Pan American Court, however, still clings to the idea of one state, one judge, and provides in Article 1 that "the Pan American Court of International Justice shall be composed of a member from each one of the contracting parties and appointed by it." If all the American states accept the plan, this would mean twenty-one judges. Article 2 provides for an additional judge, a Canadian jurist, who is to be chosen by lot from an urn in which has been deposited the name of one Canadian jurist selected by each of the American Republics. This would give a court of twenty-two members.

Article 3 proceeds to cast these twenty-two names into another urn from which one-half emerge as members of the Court of First Instance, the second half constituting a "Court of Appeal." It is provided that "in respect to the United States and Canada, the person whose name is first drawn shall be in the first branch, and the person whose name is last drawn shall be reserved for the Court of Appeal." [8] Presumably it was intended by this provision to meet as far as seemed practicable the idea that "the various juridical systems of the world," to use the language of the Second Hague Conference,[9] or, as the Committee of Jurists expressed it, "the main forms of civil-

[7] See Proceedings of the American Society of International Law, 1920, p. 44 *et seq.* See also the Costa Rican plan for a Pan American Court of Justice, Special Supplement to this JOURNAL, October, 1926, p. 385.

[8] (Article 3). An appeal on matters of law lies from the Court of First Instance to the Court of Appeal (Article 41). In each court dissenting members may make their dissent and the reasons therefor of record (Articles 38–41). This last is a most necessary provision. Compare the language of the Hague Convention of 1899, Article 52, with the corresponding Article of the Hague Convention of 1907, Article 79.

[9] Annex to the first opinion expressed by the Second Peace Conference; Draft convention relative to the creation of a juridical arbitration court, Part 1, Article 1, Scott's Texts of the Peace Conference of The Hague, p. 141.

ization and the principal legal systems of the world,"[10] should be represented upon the court. However, this would insure the presence of only one representative of the Anglo-Saxon legal system upon each branch of the tribunal, the remaining ten members being jurists educated under the régime of the civil law. And yet Chief Justice Marshall is said to have remarked, "Russia and Geneva have equal rights."[11] The same might perhaps be urged in equity of Pennsylvania and Haiti.

In this connection it is to be remembered that the recognized theoretical (and it is to be hoped practical) advantages of a permanent tribunal as against tribunals selected *ad hoc*, even though selected from a restricted panel, can be too dearly bought and they are bought too dearly if the permanent tribunal, owing to its method of composition, suffers from practical disadvantages, which tend to prevent nations from accepting it or resorting to it as freely as they would to an *ad hoc* tribunal, or which in actual operation cause it to yield results less satisfactory than those heretofore achieved by *ad hoc* tribunals. Moreover, granting that a system of regional permanent courts is a desirable alternative or complement to the Permanent Court of International Justice, it is a fair question whether a Pan American Tribunal represents the best grouping of the nations for a regional court of justice. Central America now has a tribunal (to be constituted *ad hoc* out of a panel of thirty named jurists) provided for in the convention signed at Washington, February 7, 1923. The United States and Canada have agreed to submit many important differences to an international joint commission.[12] It might well be argued that the logical next step is three regional permanent tribunals in the New World, one for North America, one for Central America, one for South America. Again, other groupings suggest themselves along linguistic and cultural, rather than geographical, lines, such, for instance, as a permanent court of justice for the English-speaking world and another for the Spanish-speaking world. But if a Pan American Tribunal be the next step, it is respectfully submitted that the plan for the selection of the judges in the project under discussion is quite inadequate to meet the needs of the situation, and that if the Pan American Court of Justice is to be made a reality, the old Hague panel system recently adopted by Central America should be adhered to until some satisfactory method has been evolved of constituting a tribunal which shall fulfil the two essential requirements of a permanent court for the Western hemisphere, first, that its membership shall be so limited as to enable it to function as a real court, and, second, that the members shall be selected by some plan adapted to securing a fair representation of the

[10] Hague Project, Article 9, A. S. I. L. Proceedings, 1920, p. 44 at 48.

[11] The Antelope (1825), 10 Wheat. 66, 122.

[12] Convention concerning the boundary waters between the United States and Canada, signed at Washington, January 11, 1909, U. S. Treaty Series, No. 548; Treaties and Conventions, Vol. 3, p. 2607 at 2611; Supplement to this JOURNAL, Vol. 4 (1910), p. 239.

geographical extent, the population, the culture, the intelligence and the power of the nations in the new world.

Obligatory Jurisdiction. Article 17 provides for obligatory jurisdiction in certain cases, and Article 20 provides that cases should be initiated either by "special agreement or by a written application." Query, is the provision for obligatory jurisdiction in Project 28 consistent with the liberal provisions of Project 27 as respects various means of pacific settlement, particularly Articles 25 and 26 which provide, respectively, for resort to the Permanent Court of Arbitration and the Permanent Court of International Justice at The Hague.

"From lower to the higher next,
Not to the top, is nature's text."

It is submitted that if the Pan American Court of Justice is to become a reality, resort thereto should at first be optional, as in the case of the Permanent Court of International Justice at The Hague as finally adopted, and thereafter the court should win its way on its merits.

Two other very practical points may be noticed.

Language. Article 19 provides that the languages of the court shall be the official languages of the contracting Republics. Upon the failure of the parties to determine the language or languages to be used, the court shall do so on the request of one or the other of the parties. This leaves the court with at least four official languages, English, French, Spanish and Portuguese. The original Hague project of 1920 provided that "the official language of the court shall be French." The Council of the League modified this to read "the official languages of the court shall be French and English." This provision has been interpreted in Article 37 of the rules of the Permanent Court of International Justice. The difficulty of excluding the language spoken in any of the American Republics from the list of official languages of a Pan American Court of Justice is obvious, but it is submitted that the difficulty of attempting to transact business in a court where there are four official languages is also obvious.[13]

Examination and Cross-Examination of Witnesses. Article 32 of the proj-

[13] In the protocol between the United States and Venezuela providing for the submission of the Orinoco Steamship Case to the Hague Tribunal (Treaties, Conventions, International Acts, etc., Vol. 2, p. 1881; Supplement to this JOURNAL, Vol. 3 (1909), p. 224.) provision was made for three official languages, English, Spanish and French, "in the presentation of cases" by the parties. There was no express provision as to the language to be used by the court. It was probably thought that this provision might bring about the exclusive adoption of French as the neutral language by common consent; but it did not happen that way. The United States selected a judge familiar with all three of the official languages. Venezuela appointed a judge who knew only French. The court ruled that it would use the English and French languages during the discussion. Documents were before the court in three languages. The American Agent and Counsel addressed the court in English, the Venezuelan Agent was compelled to speak in French and to decline the humorous but *bona fide* offer of the American Agent, made out of court, that the Venezuelan Agent and one of American counsel should address the court in Spanish, on the ground that such an

ect under discussion provides: "During the hearing the judges may put any questions, considered by them to be necessary, to the witnesses, agents, experts, or advocates. The agents and advocates shall have the right to ask, through the President, any questions that the court considers useful." This is substantially the original rule of the Hague Jurists. It was replaced by the Assembly of the League of Nations by the following article: "During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the court in the rules of procedure referred to in Article 30." (Article 51). And the Rules of Procedure of the Permanent Court provide, Article 51: "Witnesses shall be examined by the representatives of the parties under the control of the President. Questions may be put to them by the President and afterwards by the judges." It is submitted that it would have been better to have accepted the League amendment and to have preserved the right of examination and cross-examination by counsel for the parties under the control of the court.

Further discussion of the details of the project for the Pan American Court would unduly expand this editorial comment, and yet in such a project the practical details are of the utmost importance.

In conclusion it may be said that these projects have the great merit of courageously looking toward the elimination of war in the Western hemisphere, and if it be thought that in various ways practical wisdom in the development of details has not always kept pace with the idealism by which they are inspired, it is to be borne in mind, first, that the difficulties of such a body as the Institute in agreeing upon projects of this kind are perhaps as great as those of an official international conference, while some of the elements which make for agreement upon a workable basis in an official body are absent; and further that by the time these projects have run the gauntlet of the International Congress of Jurists to be held at Rio de Janiero, the Sixth Pan American Congress, the United States Senate, and the coördinate legislative departments of the other American Republics, there will have been ample opportunity for the marriage of the practical with the ideal.

It is believed that Projects 27 and 28 of the American Institute of International Law taken as a whole form an interesting and stimulating contribution to the constantly accumulating literature of the plans for the pacific settlement of international disputes, and the members of the Institute have rendered all students of the subject their debtors.

WILLIAM C. DENNIS.

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address could only be understood by the member of the court who had been named by the United States. (See this JOURNAL, Vol. 5 (1911), p. 59.)

Interpreters are not only an expensive and time consuming nuisance, but often a substantial impediment at arriving at the truth. Unless international justice is to be in large part administered by men whose accomplishments are linguistic rather than legal two official languages for a permanent court (as distinguished from a panel court) are all that the traffic will bear.

PROJECTS OF THE AMERICAN INSTITUTE OF INTERNATIONAL LAW ON MEASURES OF REPRESSION AND CONQUEST

Project No. 29. Measures of Repression

> The American Republics . . . resolved to avoid resort to arms for the settlement of disputes which may arise between them, have agreed upon the following convention.

The measures of self-redress which do not involve war are said to be of two kinds: (1) Pacific, and (2) Coercitive.

This classification seems faulty, because the logical contraposition is between a state of peace and a state of war. To call one class "Pacific" is to imply that the "Coercitive" acts are not pacific. Both classes are pacific since they fall short of a state of war.

A more exact classification would be (1) *Non-forcible measures*, and (2) *Forcible measures;* it being understood that force may be applied in the forms mentioned and yet be "short of war." The *Non-forcible measures* would be: severance of diplomatic relations, embargo limited to restraint of departure from a territory of its own vessels or property, and non-intercourse. *Forcible measures* would be retorsion, reprisals, embargo extended to the departure of vessels or property belonging to the country against which the embargo is directed, and blockade of ports or coasts confined to the country against which the action is taken.

All these acts, even those which imply the exercise of force, fall short of war, and may be therefore classed as pacific; but the *forcible measures* may very easily lead to war. Therefore there is great wisdom in the precaution enjoined in the final paragraph of this project, which is the most important of its provisions. It reads as follows:

> As the use of force against any American Republic is a matter of concern to all the republics of the continent, any republic against which an attempt is made to enforce any one of the above-mentioned measures should immediately notify the Pan American Union in order that the Governing Board thereof may consider the matter and take such action as it may deem advisable.

This project is admirably conceived, but could be more clearly formulated. Such expressions as "pacific embargo" and "pacific blockade," though in common use, would better pass into the discard, and precise definitions should be given of permissible acts which fall "short of war."

Project No. 30. Conquest

> The American Republics . . . animated by the desire of preserving the peace and prosperity of the continent, for which it is indispensable that their mutual relations be based upon principles of justice and upon respect for law, solemnly declare as a fundamental concept of American international law that, without criticizing territorial acquisitions effected in the past, and without reference to existing controversies—
>
> In the future territorial acquisitions obtained by means of war or

under the menace of war or in presence of an armed force, to the detriment of any American Republic, shall not be lawful; and that

Consequently territorial acquisitions effected in the future by these means cannot be invoked as conferring title; and that

Those obtained in the future by such means shall be considered null in fact and in law.

This repudiation of territorial conquest as illegal is the high-water mark of international right which has so far been reached in the form of law. By removing what is perhaps the most unworthy object of war, territorial expansion, it removes one of the chief causes of armed conflict.

While it is much to be desired that this standard be raised as an expression of American ideals and solidarity of purpose, it cannot be overlooked that its application implies the existence of stable and responsible governments capable of suppressing internal disorder and fulfilling international duties.

DAVID JAYNE HILL.

CURRENT NOTES

POSTPONEMENT OF THE ANNUAL MEETING OF THE SOCIETY

The annual meeting of the American Society of International Law will not be held in April as usual this year, but has been postponed until October, 1927. This action has been taken by the Committee on Annual Meeting after consultation with the officers and a number of members of the Society. The purpose of the postponement is to enable the Society to meet at the same time as the *Institut de Droit International*, which will convene in Washington on October 12th and remain in session until October 24th next. The members of the *Institut* will be invited to attend the sessions of the Society, and it is hoped that arrangements can be made whereby the members of the Society will be admitted to the sessions of the *Institut*. It is further expected that the Society will act as host to the members of the *Institut* at the annual dinner which will close the Society's meeting. The exact days of the Society's meeting between October 12th and 24th will be announced later.

This is the first time that the *Institut de Droit International* has met in Washington. It had planned to meet in Washington in the year 1920, but the situation then existing due to the political campaign of that year seemed to make it advisable to postpone the Washington meeting until some other occasion. In the view of the officers and members of the *Institut* the fall of 1927 seems to provide that occasion, and the Committee on Annual Meeting feels certain that the members of the Society will be glad of the opportunity to meet with the members of the *Institut* and to act as their hosts as far as practicable.

OSCAR S. STRAUS

December 23, 1850–May 3, 1926

Statesman, man of affairs, philanthropist, Mr. Straus belonged to all classes of our people; and yet, in a very real sense, the members of the American Society of International Law claim him as one of their own.

He was present at the founding of the Society, which would not have come into being but for the keen interest which he took in its formation. And the AMERICAN JOURNAL OF INTERNATIONAL LAW is likewise due to his support of the project, and his belief that it could be published with the fees of members of the Society, without the creation of a special fund. It is doubtful if the Society or the JOURNAL would have continued to exist had it not been for Mr. Straus' enthusiasm, encouragement, and enlightened support of each during the period of their infancy. Money debts can be repaid with money—the debt of gratitude can only be acknowledged, it

can never be adequately repaid; and as long as the American Society of International Law and its journal exist, the name of Mr. Straus should be held in grateful memory, not only by the members of the Society, but by students of international law in all parts of the world, so greatly has the labor of his hands prospered.

The American Society of International Law was proposed at the Conference on Arbitration held at Lake Mohonk in 1905. Mr. Charles Noble Gregory, then Dean of the Law School of Iowa State University, was one of the earliest and most ardent advocates of the Society and the JOURNAL. At Mohonk, Mr. Chandler P. Anderson, then engaged in the practice of law in New York City, and destined to become a leader of the international bar and an international arbiter of distinction; Mr. George W. Kirchwey, then Dean of the School of Law of Columbia University and later greatly interested in and favorably known for his services to prison reform; Mr. Robert Lansing, then a lawyer engaged in the practice of his profession at Watertown, New York, and within a few years to become Secretary of State of the United States, and the undersigned, were present. Mr. Kirchwey, on their behalf, laid before the Conference the proposal of forming the Society of International Law. It met with approval, and a committee was appointed, with Mr. Straus as chairman, and the undersigned as secretary, to take the necessary steps.

Had it not been for Mr. Straus, it is probable that with the dispersal of the committee nothing more would have been heard of the Society, except perhaps to "report progress at next year's session." In the autumn he requested Mr. Anderson and Mr. John Bassett Moore, then Professor of International Law and Diplomacy at Columbia University, and now crowning the achievements of a lifetime as Judge of the Permanent Court of International Justice at The Hague, and the undersigned, to meet at his residence, to see what could and should be done in order to create the Society and to start the JOURNAL. Every week a meeting was held until the 9th of December, 1905, by which time matters had progressed so far that Mr. Straus gave a dinner to the notabilities of international law. It was thereupon agreed that a meeting for the organization of the Society should be held in rooms of the New York Bar Association and, with the permission of that body, the meeting was held at its headquarters on Friday, January 12, 1906, when the Society was organized, a constitution adopted, and officers elected, with Mr. Elihu Root as President, Mr. Charles Henry Butler, Corresponding Secretary, Mr. Oscar S. Straus, Chairman of the Executive Committee, Mr. Chandler P. Anderson, Treasurer, and the undersigned, Recording Secretary.

Within the same year, on the 29th of the month of January, to be specific, the first regular meeting of the Executive Council was held in Washington, under Mr. Root's presidency, and the plan for the AMERICAN JOURNAL OF INTERNATIONAL LAW, which had been presented and read on December 9,

1905, at Mr. Straus' residence, was approved, and the matter referred to the Executive Committee "with the approval of the Council." Of this Council, Mr. Straus was Chairman. The next meeting of the Executive Council was held on June 1, 1906, at Lake Mohonk in connection with the Conference on Arbitration, and the proposal to launch the JOURNAL OF INTERNATIONAL LAW was approved. Mr. Straus was present in person. It is thus a matter of record that the American Society of International Law and the AMERICAN JOURNAL OF INTERNATIONAL LAW came into being under the chairmanship of Mr. Straus. They are but two small monuments which his associates hope will indeed be more permanent than brass or stone.

Mr. Straus' career, other than the small portion of it connected with the American Society of International Law and its journal, is thus set forth in a minute adopted December 2, 1926, by the Trustees of the Carnegie Endowment for International Peace, of which institution he was a trustee from its foundation:

> Mr. Straus was born in Bavaria on December 23, 1850, and at the age of four years emigrated with his parents to the United States. He lived in Georgia until he was 15 years old, and then removed to New York City, where he received his collegiate and professional education at Columbia College. From his graduation in 1873 until 1881 he practised law in New York City, and then engaged in the mercantile business from which he finally retired in 1906.
>
> His long career of public service started in 1887, when he was appointed American Minister to Turkey, which position he filled for two years, again resumed it for a three-year term in 1898, and finally finished his services at Constantinople as American Ambassador from May, 1909, until December, 1910.
>
> In 1902, Mr. Straus was appointed a member of the Permanent Court of Arbitration at The Hague, and was reappointed by Presidents Roosevelt, Taft and Wilson. On December 17, 1906, he entered President Roosevelt's cabinet and served as Secretary of Commerce and Labor until March 4, 1909, . . .
>
> It was upon this record of achievement in the promotion of friendly and just relations between nations that Mr. Carnegie, in December, 1910, invited Mr. Straus to become one of the original Trustees of his Endowment for International Peace. Mr. Straus' faithfulness to his duties as a member of this Board during the ensuing sixteen years is a matter of official record in the minutes.
>
> Mr. Straus gave liberally of his time and energy to the domestic questions and affairs of his state and nation. He was a former President of the New York Board of Trade and Transportation, the National Primary League, the American Social Science Association, and Vice President of the National Civic Federation. He was Chairman of the Arbitration Commission appointed in 1912 to decide the wage dispute between the eastern railways and their engineers. From 1915 to 1918 he was Chairman of the New York Public Service Commission, First District, and was a member of President Wilson's Second Industrial Conference.

His thorough Americanism and deep interest in the basic problems of American life and government appear from the pages of a number of volumes which he published at intervals in his busy life. His first book appeared in 1886 and dealt with "The Origin of the Republican Form of Government in the United States." Another phase of his interest was shown when he published in 1894 "Roger Williams—the Pioneer of Religious Liberty," to be followed two years later by "The Development of Religious Liberty in the United States." In 1897 Mr. Straus published a volume on the "Reform of the Consular Service"; in 1901 another on "The United States Doctrine of Citizenship," and a year later he issued "Our Diplomacy with Reference to Our Foreign Service." A volume entitled "The American Spirit" appeared from his pen in 1913, and his final volume in the nature of memoirs appeared in 1922 under the title "Under Four Administrations."

JAMES BROWN SCOTT.

MR. HUGHES APPOINTED TO THE PERMANENT COURT OF ARBITRATION

On September 30, 1926, the Secretary of State announced the designation by the President of the Honorable Charles Evans Hughes as a member for the United States of the Permanent Court of Arbitration at The Hague for a term of six years. The Government of the United States is fortunate in having available for appointment to this international tribunal established by the Hague Convention of 1899 for the peaceful settlement of international disputes, a former Secretary of State of the United States, Associate Justice of the Supreme Court of the United States, and Governor of the State of New York, and the members of the American Society of International Law felicitate its president upon receiving and accepting this well deserved honor.

Membership in the panel of the Permanent Court of Arbitration has assumed added importance since the adoption of the Statute of the Permanent Court of International Justice. Article 4 of the Statute provides that the members of that court shall be elected by the Assembly and Council of the League of Nations from a list of persons nominated by the national groups in the Permanent Court of Arbitration. The nominations are made upon the written request of the Secretary General of the League of Nations at least three months before the election of the judges. The members of the national groups on the Permanent Court of International Justice nominate not more than four persons, two of whom only may be of their own nationality (Article 5), and before making nominations they are recommended to consult the highest court of justice of their country, its legal faculties and schools of law, its national academies and the national sections of international academies devoted to the study of law (Article 6).

Mr. Hughes has been appointed to fill the vacancy caused by the death of the late Judge George Gray. The other representatives of the United

States are the Honorable Elihu Root and Judge John Bassett Moore. The fourth place is now vacant due to the death on May 3rd last of the Honorable Oscar S. Straus.

CARNEGIE ENDOWMENT FELLOWSHIPS IN INTERNATIONAL LAW

The Carnegie Endowment for International Peace has issued its usual announcement concerning International Law Fellowships to be awarded for the ensuing academic year. The announcement is in most respects similar to the announcement issued a year ago. Two classes of fellowships will be awarded for the year 1927–1928: Students' Fellowships, carrying a stipend of $1,000, and Teachers' Fellowships, carrying a stipend of $1,500. An additional sum of $300 is attached to a Teacher's Fellowship if the Fellow pursues his study abroad, on account of the cost of the transatlantic passage. Students' Fellowships are awarded only to graduate students holding the equivalent of a bachelor's degree, while for Teachers' Fellowships at least one year of teaching experience in international law or related subjects is required, or its equivalent in practice. In general a knowledge of the elements of international law and a good knowledge of history are necessary, and it is desirable that at least two modern languages be furnished. The Fellow must enroll as a student in a university or college, and devote his entire time to the study of international law and related subjects; and his course of study must be submitted to and approved by the Committee on Fellowships. Applications will be received up to March 16, 1927. Application blanks and a circular containing detailed information for applicants will be furnished upon request to the Committee on International Law Fellowships, 2 Jackson Place, Washington, D. C. These fellowships have been established by the Trustees of the Carnegie Endowment for the purpose of providing an adequate number of teachers competent to give instruction in international law and related subjects, as an aid to the colleges and universities in extending and improving the study and teaching of those subjects.

FELLOWSHIPS AT THE HAGUE ACADEMY OF INTERNATIONAL LAW

While precise information has not reached the JOURNAL concerning the fellowships to be awarded at the Academy for the summer of 1927, it is very probable that the number to be awarded and the conditions under which they are to be enjoyed will be similar to those awarded for the session of 1926. Last year thirteen fellowships were open to competition, seven being of 400 florins each, given by the Academy itself, and open to applicants of any nationality; five of 400 florins each given by the Government of the Netherlands for the benefit of applicants from outside that country; and one fellowship of Fr. 4,000 given by the French Government, to be enjoyed by a French citizen. The Curatorium of the Academy, which examines the

applications and awards the foregoing fellowships, had before it last spring 71 applications proceeding from 19 different countries. In addition, a fellowship has been provided by the Cuban foundation of Dr. A. S. de Bustamante, Judge of the Permanent Court of International Justice, and the Danish scientific endowment, Rask Oersted, granted scholarships to five Danes.

Applications for fellowships should be addressed by the applicants themselves directly to the President of the Curatorium, M. Charles Lyon-Caen, 13, rue Soufflot, Paris, and should give their full names, nationality, place and date of birth, present position, and a statement of their qualifications, accompanied by recommendations and if possible by a copy of any scientific work published by them. Applications should reach the President not later than April 30th. Applicants will be notified not later than June 15th of the decision of the Curatorium. Not more than one fellowship will be awarded in any year to applicants of the same nationality. Successful applicants have no other obligation than that of attending the Academy during one of the two periods which constitute its annual session. They may if they desire attend both periods of the session.

PRIZE COMPETITION OF LEIDEN UNIVERSITY

The Law Faculty of Leiden University announces prizes to an amount of 5,000 Dutch guilders and invites international competition in the preparation of a critical report, complete as far as possible from public sources, which alone must be consulted, on the Congress of Westphalia and the preceding peace negotiations. The report must bring out the importance of the Congress in the organization of the Western state community as well as other questions of international law, *e.g.*, the question how far there is reason for considering the year 1648 as a milestone in the development of international law.

The reports should be typewritten in French or Dutch and must be in the hands of the Dean of the Law Faculty of Leiden University before May 1, 1928. The papers should not be signed but bear a motto which should be reproduced in a sealed envelope attached to the manuscript containing the name and address of the author. The prize winners will be selected by the Law Faculty.

This competition is made possible by the will of the late S. J. Visser, LL.D., a colonial judge who died in 1919 and bequeathed his fortune to Leiden University on the condition that the revenue should be utilized to promote the study of public and private international law.

THE FRENCH OFFICE OF FOREIGN LEGISLATION AND INTERNATIONAL LAW

This office was established by decree of the President of France on July 21, 1910, to make accessible in Paris the legal history of the countries of the

civilized world together with their constitutions, laws and judicial decisions. It was placed under the direction of the Keeper of the Seals in the Ministry of Justice and, among other duties, it is charged with placing at the disposal of the public the legislative acts and other documents of foreign countries, collecting and preserving works on international law and foreign law, and furnishing to public bodies and interested persons translations of foreign laws, treaties and other documents.[1]

We are in receipt of a letter from one of our members residing in Paris, Mr. William H. Pauling Emrich, stating that although the library of the office is now composed of 100,000 volumes, the American looks in vain for a worthy representation of his government and history, and appealing for donations of volumes containing annotated State statutes, acts of incorporation and municipal ordinances of the principal cities, textbooks on American legal subjects, reports of the State supreme courts, publications in the political, moral and social sciences, international and constitutional law, comparative jurisprudence and law reform, American law journals, reviews and publications pertaining to government, legislation and administration of justice. Mr. Pauling Emrich points out that "The American Republic as the mother of modern republics has reformed and revolutionized to a greater or less degree all the existing Governments of the world, their laws and executive procedure," and that "In International Law the European professors proclaim the American nation as the dominating influence for the past hundred years," but only fragmentary material on American constitutional law, history and practice has been available to the foreign representatives in attendance upon the international conferences at and near Paris who have sought information and direction in the preparation of new constitutions and legislation for their governments.

The appeal is approved by the French Minister of Justice and Keeper of the Seals. Any books or periodicals contributed should be dedicated in the handwriting of the donors to the *Bibliothèque de l'Office de Législation Etrangère*, and sént by parcel post to the librarian of the Bibliothèque, 13 Place Vendôme, Paris.

[1] An English translation of the decree is printed in the Supplement to this JOURNAL, Vol. 5 (1911), p. 83. See also editorial comment in the same number of the JOURNAL, p. 478.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 16, 1926–NOVEMBER 15, 1926
(With references to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *C. A. P.*, Collection of Advisory Opinions of Permanent Court of International Justice; *C. J.*, Collection of Judgments of the Permanent Court of International Justice; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Cur. Hist.*, Current History (New York Times); *E. E. P. S.*, European Economic and Political Survey; *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *G. B. Treaty Series*, Great Britain, Treaty series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Official (France); *L. N. M. S.* League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series; *Nation (N. Y.)*; *N. Y. Times*, New York Times; *P. A. U.*, Pan American Union Bulletin; *Press notice*, U. S. State Dept. press notice; *Rev. int. de la Croix-Rouge*, Revue international de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

November, 1925

2 GREAT BRITAIN—NEJD (ARABIA). Agreement concerning relations with Syria signed at Bahra. Text: *Europe*, Oct. 30, 1926, p. 1502.

29 CZECHOSLOVAKIA—GERMANY. Exchanged ratifications of convention relative to conditions of labor on the Oder, signed at Prague Dec. 15, 1924. Text: *La Navigation du Rhin*, 1926, *4:* 528–9.

March, 1926

17–18 FRANCE—PORTUGAL. Exchanged notes, extending extradition convention of July 13, 1854, to colonies and possessions of each country. *J. O.*, Oct. 17, 1926, p. 11363.

May, 1926

3 ESTHONIA—GREAT BRITAIN. Exchanged ratifications of most-favored-nation commercial treaty signed Jan. 18, 1926. *U. S. Daily*, Sept. 13, 1926. *Commerce Reports*, Sept. 13, 1926, p. 690.

30 FRANCE—TURKEY. Convention of friendship, concerning relations with Syria and Lebanon, signed at Angora. Text: *Europe*, Oct. 30, 1926, p. 1504.

July, 1926

1 FINLAND—GREECE. Provisional commercial agreement, signed June 22, 1926, came into force. *Commerce Reports*, Oct. 11, 1926, p. 116.

5 MOSLEM LEAGUE OF NATIONS CONFERENCE. Adjourned meeting held at Mecca. *Cur. Hist.*, NOV., 1926, *25:* 278.

14 GERMANY—SWITZERLAND. Signed commercial treaty. *Commerce Reports*, Sept. 13, 1926, p. 690.

28 SIAM—SPAIN. Treaty of friendship, commerce and navigation signed Aug. 3, 1925, came into force. *U. S. Daily*, Sept. 13, 1926, p. 2. *Commerce Reports*, Sept. 13, 1926, p. 690.

31 *to November 17* MEXICO—UNITED STATES. Exchanged correspondence concerning alien land and oil laws. Text: *Press notice*, Nov. 23, 1926. *U. S. Daily*, Nov. 24–27 1926.

31 PERMANENT COURT OF INTERNATIONAL JUSTICE. Closed 11th (ordinary) session. Rules of Court, as amended, came into force. Text of rules (Ser. D, no. 1): *L. N. M. S.*, Sept. 15, 1926, p. 176.

August, 1926

6 GREAT BRITAIN—NETHERLANDS. Royal decree issued in London regarding exchange of notes renewing for further period of five years, from July 12, 1925, of arbitration convention signed in London Feb. 15, 1905, and renewed in 1909, 1915 and 1920. *Times*, Sept. 4, 1926, p. 9.

7 FRANCE—SPAIN. Exchanged ratifications of arrangement concerning fiscal régime of societies signed at Madrid May 18. Text: *J. O.*, Sept. 12, 1926, p. 10154.

8 CHINA—FRANCE. Treaty provisions with France providing for special reductions in certain customs duties cancelled by China, effective Oct. 8, 1926. *Commerce Reports*, Sept. 27, 1926, p. 818.

8 GERMANY—HONDURAS. Most-favored-nation commercial treaty signed Mar. 4, 1926, came into force. *Commerce Reports*, Sept. 27, 1926, p. 818.

10 CHILE—UNITED STATES. Reciprocal agreement concerning passport visas came into force. *P. A. U.*, Nov., 1926, p. 1147.

14 FRANCE—SPAIN. Commercial agreement, supplementary to convention of July 8, 1922, arranged by exchange of notes, effective Aug. 16, 1926. *U. S. Daily*, Sept. 28, 1926, p. 2. *Commerce Reports*, Sept. 27, 1926, p. 818.

17 GREECE—SERBIA. Signed four railway tariff conventions and a defensive treaty of friendship and conciliation. *N. Y. Times*, Aug. 18, 1926, p. 9. *Times*, Aug. 18, 1926, p. 10.

19 *to November 14* NICARAGUA. Hostilities by revolutionists began on Aug. 19. On Aug. 28, 200 American sailors and marines landed at Bluefields to protect foreign life and property. On Aug. 27, Nicaraguan Foreign Office sent protest to League of Nations against alleged Mexican assistance to revolutionists. On Sept. 15, President Coolidge placed embargo on export of arms and munitions to Nicaragua. On Sept. 23, a fifteen-day armistice was concluded between the two factions. *Cur. Hist.*, Oct.–Nov., 1926, *25:* 121, 289. On Nov. 14, President Chamorro resigned and Adolfo Diaz was elected president. *N. Y. Times*, Nov. 15, 1926, p. 4.

21 BELGIUM—LATVIA. Exchanged ratifications of most-favored-nation commercial treaty signed July 7, 1925. *U. S. Daily*, Sept. 20, 1926, p. 2.

22 AUSTRIA—SERBIA. Most-favored-nation commercial treaty signed Sept. 3, 1925, came into force. *Commerce Reports*, Oct. 25, 1926, p. 246.

23 SOVIET UNION—URUGUAY. *De jure* recognition granted by Uruguay, the first South American nation to take this step. *Cur. Hist.*, Oct., 1926, *25:* 125.

24 NETHERLANDS—SIAM. Exchanged ratifications of treaty of friendship, commerce and navigation signed June 8, 1925. *Commerce Reports*, Nov. 15, 1926, p. 444.

27 BULGARIA—TURKEY. Provisional commercial treaty signed. *Temps*, Aug. 29, 1926, p. 1.

27 FRANCE—SWITZERLAND. Signed declaration at Berne regarding exchange of acts of the civil state. Text: *J. O.*, Oct. 26, 1926, p. 11603.

27 INTERNATIONAL AIR TRAFFIC ASSOCIATION. Opened 16th conference in Berlin with representatives from 18 countries. *Times*, Aug. 28, 1926, p. 9.

30 ACADEMY OF INTERNATIONAL LAW. Ended its fourth session at The Hague. *Times*, Sept. 1, 1926, p. 12.

30 PORTUGAL—SIAM. Treaty of friendship, commerce and navigation, signed Aug. 14, 1925, came into force, following exchange of ratifications on July 31, 1926. *Commerce Reports*, Sept. 13, 1926, p. 690.

31 *to September 7* CHINA—SOVIET UNION. Exchanged notes concerning Chinese Eastern Railway. *Europe*, Oct. 2, 1926, p. 1385. Text: *E. E. P. S.*, Oct. 30, 1926, p. 109.

September, 1926

1 AFGHANISTAN—SOVIET UNION. Treaty of neutrality and mutual non-aggression signed. Summary: *Times*, Sept. 2 and 14, 1926, pp. 9 and 13.

1 CZECHOSLOVAKIA—HUNGARY. Provisional trade convention, arranged by exchange of notes on Aug. 26, came into force. *Commerce Reports*, Oct. 11, 1926, p. 116.

1–22 LEAGUE OF NATIONS CONFERENCE ON AMERICA'S WORLD COURT RESERVATIONS. Opened at Geneva on Sept. 1 with 39 of the 49 signatories to the Protocol represented. On Sept. 22, final act was adopted, together with report of M. Pilotti of Italy. *L. N. M. S.*, Oct. 15, 1926, p. 195. Text: *Cur. Hist.*, Nov., 1926, *25:* 244; supplement to this JOURNAL, p. 1.

2–16 LEAGUE OF NATIONS COUNCIL. Held 41st and 42d sessions at Geneva, Sept. 2–7 and Sept. 16–20, for consideration of committee reports, draft convention on supervision of traffic in arms, composition of the Council, etc. *L. N. O. J.*, Oct. 1926.

2 PASSPORTS. New regulations, effective Oct. 1, issued by State Department, authorize American consular officers abroad to issue passports to American citizens abroad. *Press notice*, Sept. 2, 1926. *N. Y. Times*, Sept. 3, 1926, p. 8.

4 HUNGARY—UNITED STATES. Exchanged ratifications of treaty of friendship, commerce and consular rights signed Washington, June 24, 1925. *U. S. Treaty Series*, no. 748.

6–25 LEAGUE OF NATIONS ASSEMBLY. Held seventh (ordinary) session at Geneva. Germany was admitted to the League on Sept. 8. On Sept. 16, Poland, Belgium, Rumania, Holland, Chile, Colombia, Salvador, China and Czechoslovakia were elected non-permanent members of the Council. On Sept. 8, Spain resigned. Adopted resolutions concerning reduction of armaments, composition of the Council, financial, technical and economic matters. *L. N. M. S.*, Oct. 15, 1926.

7 HAITI—NETHERLANDS. Most-favored-nation commercial convention signed. *Commerce Reports*, Nov. 1, 1926, p. 311.

8 SPAIN. Note of resignation sent to League of Nations. Text: *L. N. M. S.*, Oct. 15, 1926, p. 205. *Times*, Sept. 13, 1926, p. 12.

10 BELGIUM—GREECE. Provisional commercial agreement arranged by exchange of notes. *Commerce Reports*, Nov. 15, 1926, p. 444.

10 GREECE—SWEDEN. Signed most-favored-nation commercial treaty, effective on same date. *Commerce Reports*, Nov. 29, 1926, p. 576.

11 FRANCE—GREECE. Treaty of commerce signed Sept. 8, 1926, came into force in France. Text: *J. O.*, Sept. 11, 1926, p. 10130.

12 ITALY—RUMANIA. Treaty of friendship and arbitration signed at Rome. *Times*, Sept. 18, 1926, p. 9. Text: *E. E. P. S.*, Sept. 30, 1926.

15 NICARAGUA. President Coolidge issued proclamation placing embargo on shipment of arms and munitions from United States to Nicaragua. Text: *U. S. Daily*, Sept. 18, 1926, p. 2.

17 BELGIUM—CZECHOSLOVAKIA. Exchanged ratifications of Commercial treaty signed Dec. 28, 1925. *Commerce Reports*, Nov. 8, 1926, p. 377.

18 CHINESE EXTERRITORIALITY COMMISSION. State Department announced that report on extraterritoriality in China, upon which representatives of 14 governments have been engaged for nearly a year, had been signed in Peking. *U. S. Daily*, Sept. 20, 1926, p. 1.

27 CHINA. Agreement between Consular Body and Provincial Chinese officials for the rendition of the Mixed Court at Shanghai made public. Position of foreigners protected by full continuance of treaty rights. *Times*, Sept. 28, 1926, p. 14.

27 LIBERIA—UNITED STATES. Exchanged ratifications of arbitration convention signed Feb. 10, 1926. *U. S. Daily*, Oct. 1, 1926, p. 2.

27–29 PAN AMERICAN CONFERENCE OF NATIONAL DIRECTORS OF PUBLIC HEALTH. First conference held in Washington. *P. A. U.*, Dec., 1926, p. 1169.

28 LITHUANIA—SOVIET UNION. Treaty of friendship and non-aggression signed at Moscow. Text: *E. E. P. S.*, Oct. 15, 1926, p. 83. *Europe*, Nov. 13, 1926, p. 1577. *Cur. Hist.*, Dec., 1926, *25:* 456. *Russ. R.*, Nov., 1926, p. 197.

30 PERMANENT COURT OF ARBITRATION. Charles Evans Hughes designated by President Coolidge to be one of the three American members of the Court. *N. Y. Times*, Oct. 1, 1926, p. 1.

October, 1926

1 FINLAND—GERMANY. Most-favored-nation commercial treaty signed June 26, 1926, came into force for a period of three months. *Commerce Reports*, Nov. 29, 1926, p. 576.

3–6 PAN EUROPEAN CONGRESS. Opened at Vienna on Oct. 3 to consider formation of a Pan European Union. *N. Y. Times*, Oct. 4, 1926, p. 23; Nov. 14, 1926, IX, 6. Closed Oct. 6, adopting all resolutions of its committees and manifesto appealing to European governments to call official Pan European conference. *N. Y. Times*, Oct. 7, 1926, p. 7.

16 ITALY—SPAIN. Exchanged ratifications of treaty of arbitration signed Aug. 7, 1926. *Temps*, Oct. 18, 1926, p. 1.

19 FINLAND—TURKEY. Temporary most-favored-nation commercial agreement signed, effective Oct. 26. *Commerce Reports*, Nov. 1, 1926, p. 311.

19 IMPERIAL CONFERENCE. Opened in London, to consider questions of defense, empire trade and settlement, foreign affairs, and equality of status for the Dominions. *Cur. Hist.*, Dec., 1926, *25:* 441.

22 GREAT BRITAIN—SPAIN. Exchanged notes respecting duration of commercial treaty of Oct. 31, 1922. Text: *G. B. Treaty Series* no. 27 (1926), *Cmd.* 2753.

22 RAILWAY CONFERENCE. International conference on railway traffic between Europe and the Far East opened in Berlin. *Temps*, Oct. 24, 1926, p. 1.

15 PAN AMERICAN POSTAL CONGRESS. Second congress held in Mexico City, attended also by Spain. Proposals: *L'Union Postale*, Nov. 1, 1926, p. 217.

23 POLAND—SOVIET UNION. Note of protest against Soviet-Lithuanian treaty of Sept. 28, 1926, handed to Russian Foreign Office. Text: *E. E. P. S.*, Nov. 15, 1926, p. 128.

24 FINLAND—JAPAN. Exchanged ratifications of most-favored-nation commercial treaty signed June 7, 1924, effective Nov. 1, 1926. *Commerce Reports*, Nov. 8, 1926, p. 377.

25 SIAM—SWEDEN. Exchanged ratifications of treaty of friendship, commerce and navigation signed Dec. 19, 1925. *Commerce Reports*, Dec. 6, 1926, p. 641.

30 CZECHOSLOVAKIA—JAPAN. Most-favored-nation commercial treaty signed Oct. 30, 1925, came into force. *Commerce Reports*, Nov. 22, 1926, p. 515.

November, 1926

5 LEAGUE OF NATIONS PREPARATORY DISARMAMENT COMMISSION. Military subcommittee completed its task and adjourned for an indefinite period. *N. Y. Times*, Nov. 6, 1926, p. 5.

6–7 BELGIUM—CHINA. On Nov. 6, Peking Government announced formal abrogation of Sino-Belgian Treaty of 1865. *Commerce Reports*, Dec. 6, 1926, p. 641. On Nov. 7, Belgian Government informed Peking Government that it would submit question of interpretation of Art. 46 to the Hague Court of Arbitration, whereupon China declared treaty terminated. *Times*, Nov. 8, 1926, p. 13. *N. Y. Times*, Nov. 9, 1926, p. 4.

6 FRANCE—GERMANY. Agreement concerning exchange of the products of several German and Saar industries signed in Berlin. *Times*, Nov. 8, 1926, p. 14. Text: *J. O.*, Nov. 30, 1926, p. 12564.

8 MANDATE REPORTS. British Foreign Office sent memorandum to League of Nations Council recording the opinion of Great Britain, Australia, New Zealand and the Union of South Africa upon the compilation of annual reports on the mandated territories, etc. *Times*, Nov. 20, 1926, p. 11.

11 CHINA—JAPAN. Peking Government requested a fundamental revision of the Sino-Japanese commercial Treaty. *Commerce Reports*, Dec. 6, 1926, p. 641. Text: *Europe*, Dec. 4, 1926, p 1672.

INTERNATIONAL CONVENTIONS

AGRICULTURAL WORKERS ASSOCIATION. Geneva, Nov. 12, 1921.
Ratification: Belgium. July 19, 1926. *L. N. O. J.*, Sept., 1926, p. 1118.

ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.
Adhesion: Saint Helena. July 29, 1926.
Ratification: Spain. July 29, 1926. *L. N. O. J.*, Sept., 1926, p. 1118.

ARMS TRAFFIC. Declaration regarding Ifni. Geneva, June 17, 1925.
Signature: Denmark. Aug. 9, 1926. *L. N. O. J.*, Sept., 1926, p. 1117.

ARMS TRAFFIC. Final Act. Geneva, June 17, 1925.
Signature: Denmark. Aug. 9, 1926. *L. N. O. J.*, Sept., 1926, p. 1117.

ARMS TRAFFIC. Protocol of Signature. Geneva, June 17, 1925.
Signature: Denmark. Aug. 9, 1926, *L. N. O. J.*, Sept., 1926, p. 1117.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.
Ratification: France. Sept. 5, 1926. *J. O.*, Sept. 12, 1926, p. 10154.

EMPLOYMENT OF CHILDREN IN INDUSTRY. Washington, Nov. 28, 1919.
Ratification: Japan. Aug. 7, 1926. *L. N. O. J.*, Sept., 1926, p. 1118.

EMPLOYMENT OF YOUNG PERSONS AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.
Ratification: Belgium. July 19, 1926. *L. N. O. J.*, Sept., 1926, p. 1118.

HUNGARIAN PEACE TREATY. Trianon, June 4, 1920.
Ratification deposited: China. Oct. 1, 1926. *J. O.*, Nov. 9, 1926, p. 11922.

LEAGUE OF NATIONS. Covenant. Protocol of Amendments. Geneva, Oct. 3–5, 1921.
Ratification (Art. 4): Spain. July 29, 1926. *L. N. O. J.*, Sept., 1926, p. 1118.

LOCARNO AGREEMENTS. London, Dec. 1, 1925.
Ratification deposited: Belgium, Czechoslovakia, France, Germany, Great Britain, Italy and Poland. Sept. 14, 1926. *L. N. O. J.*, Sept. 16, 1926, p. 124. *U. S. Daily*, Sept. 17, 1926, p. 7. Promulgated in France, Oct. 26, 1926. *J. O.*, Oct. 29, 1926, p. 11699.

MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.
Ratification: Belgium. July 19, 1926. *L. N. O. J.*, Sept., 1926, p. 1118.

MERCHANDISE TRANSPORT BY RAILWAY. Berne, Oct. 23, 1924.
Ratification: France. Aug. 27, 1926. *J. O.*, Sept. 2, 1926, p. 9890.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.
Ratification: Belgium. July 31, 1926. *L. N. O. J.*, Sept., 1926, p. 1117.

OPIUM AGREEMENT. Geneva, Feb. 11, 1925.
Adhesion: Danzig. Aug. 7, 1926. *L. N. O. J.*, Sept., 1926, p. 1117.

PAN AMERICAN SANITARY CODE. Havana, Nov. 14, 1924.
Ratification: Honduras. Mar. 26, 1926. *P. A. U.*, Nov., 1926, p. 1148.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.
Adhesion: Abyssinia. July 16, 1926.
Ratification: Switzerland. July 24, 1926. *L. N. O. J.*, Sept., 1926, p. 1117.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of Signature. Geneva, Dec. 16, 1920.
Adhesion: Abyssinia. July 16, 1926. *L. N. O. J.*, Sept., 1926, p. 1117.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of Signature. Geneva, Dec. 16, 1920.

Ratification: Irish Free State. Aug. 21, 1926. *L. N. M. S.*, Nov. 15, 1926, p. 244.

POSTAL CONVENTION. Madrid, Nov. 13, 1920.

Ratification: Guatemala. May 1, 1926. *P. A. U.*, Oct., 1926, p. 1038.

RADIOTELEGRAPH CONVENTION. London, July 5, 1912.

Ratifications:

Dominican Republic. April 9, 1926.

Salvador. April 26, 1926. *P. A. U.*, Nov., 1926, p. 1148-9.

SLAVERY CONVENTION. Geneva, Sept. 25, 1926.

Signatures: L. N. M. S., Oct. 15, 1926, p. 221. (C. 586. M. 223. 1926. VI.)

TRAVELERS AND BAGGAGE TRANSPORT BY RAILWAY. Berne, Oct. 23, 1924.

Ratification: France. Aug. 27, 1926. *J. O.*, Sept. 2, 1926, p. 9890.

UNEMPLOYMENT INDEMNITY IN CASE OF LOSS OF SHIP. Genoa, July 9, 1920.

Adhesion: Latvia. Aug. 5, 1926. *L. N. O. J.*, Sept., 1926, p. 1118.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.

Ratification: Belgium. July 19, 1926. *L. N. O. J.*, Sept., 1926, p. 1118.

WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.

Ratification: Belgium. July 19, 1926. *L. N. O. J.*, Sept., 1926, p. 1118.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

GENERAL CLAIMS COMMISSION—UNITED STATES AND MEXICO*

THE UNITED STATES OF AMERICA ON BEHALF OF GEORGE W. HOPKINS, CLAIMANT, *v.* THE UNITED MEXICAN STATES (Docket No. 39)

Opinion and Decision, March 31, 1926

The assumption of power in Mexico by Huerta was pure usurpation. To determine liability upon contracts made during that administration it is necessary to distinguish between the acts of the Huerta administration in its personal character and acts of the government in its unpersonal character, as the greater part of governmental machinery in every modern country is not affected by changes in the higher administrative officers.

It is clear that the sale by the Mexican Government to, and the purchase by, the claimant of postal money orders falls within the category of purely governmental routine having no connection with or relation to the individuals administering the government for the time being.

The non-recognition of the Huerta administration by the American Government cannot affect the vested rights of an American citizen or act as an estoppel of the right of the American Government to espouse the claim of such citizen before this Commission.

This case is before this Commission on the Mexican Agent's motion to dismiss.

1. It is put forward by the United States of America on behalf of George W. Hopkins, who was born and has ever remained an American national. The claim is based on six postal money orders aggregating 1,013.40 pesos alleged to have been purchased by the claimant from the Mexican Government at its post offices of Mazatlan, Sinaloa, and Guaymas, Sonora, between April 27, 1914, and June 8, 1914, inclusive. It is alleged that all of these money orders were in due time presented to the Mexican authorities and payment was refused by them. The ground of the motion to dismiss is that these money orders were issued by the Huerta administration, which was illegal, that the acts of such administration did not bind Mexico, and that therefore these orders cannot be made the basis of a claim before this Commission against the United Mexican States.

Status of Huerta administration

2. In considering the character and the status of the Huerta régime this international tribunal will look to the substance rather than its form, a substance which is not difficult to discover notwithstanding the flimsy garb of constitutional power under which it undertook to masquerade. There is no

* Established in pursuance of the convention between the United States and Mexico signed September 8, 1923. C. van Vollenhoven, Presiding Commissioner; Edwin B. Parker, Commissioner; G. Fernandez MacGregor, Commissioner; Henry W. Anderson, American Agent; Benito Flores, Mexican Agent.

Headnotes inserted by the Managing Editor of the JOURNAL.

room to doubt but that the assumption of power by Huerta was pure usurpation. From being the military commander of the capital, charged with the protection of the administration of President Madero against the revolutionary activities of Generals Reyes and Díaz to overthrow it, Huerta went over to Madero's enemies (February 18, 1913); he declared himself provisional president while Madero lawfully was in power (February 18, 1913, at 2 P. M. and 9 P. M.); he imprisoned both President Madero and Vice-President Bino Suárez and compelled them to tender their resignations (February 19, 1913, about 8 A. M.); he forced the provisional acting president, Lascurain, to appoint him, Huerta, the ranking minister in office (February 19, 1913, at 10 A. M.), and immediately thereafter forced him to resign (February 19, 1913, at 11 A. M.); he had his arbitrary acts confirmed by a congress from which his antagonists had fled and which could not muster a quorum (February 19, 1913, at 11:20 A. M.); and he contrived to procure recognition in some quarters as the constitutional provisional president through the suppression of press news so that the manner of his forcibly seizing the reins of government should not be known. The Supreme Court felicitated Huerta on his assuming office prior to the assassination of Madero and his associates and before the court could have known of the methods used to seize the office. The governors of the States which recognized Huerta were, most of them, either the partisans of Reyes and Díaz with whom Huerta conspired or had been placed in power by Huerta directly after the state stroke. It is not for an international tribunal to assume that events so abhorrent as these are only to be viewed from their "legal" aspect and that uncovering the real facts means an intrusion of "moral" or "sentimental" considerations on the sacred ground of law. Nor is there reason for alleging that in so judging the Commission infringes upon Mexico's sovereignty over its domestic affairs, for the Mexican Government itself, through its Agency, invites the Commission to do so.

3. Before considering the question of the validity or nullity of acts done by or contracts entered into with a government administration of this character it is necessary to state at once the impossibility of treating alike all acts done by such an administration or all transactions entered into by an individual with it. There seems to be a tendency both in jurisprudence and in literature to do so, to declare that all acts of a given administration, the legality of which is doubtful, must have been either valid or void. Facts and practice, however, point in a different direction.

4. The greater part of governmental machinery in every modern country is not affected by changes in the higher administrative officers. The sale of postage stamps, the registration of letters, the acceptance of money orders and telegrams (where post and telegraph are government services), the sale of railroad tickets (where railroads are operated by the government), the registration of births, deaths, and marriages, even many rulings by the police and the collection of several types of taxes, go on, and must go on, without

being affected by new elections, government crises, dissolutions of parliament, and even state strokes. A resident in Mexico who cleans the government bureaus or pays his school fee to the administration does not and cannot take into consideration the regularity or even legality of the present administration and the present congress; his business is not one with personal rulers, not one with a specific administration, but one with the government itself in its unpersonal aspect.

5. The difficulty of distinguishing between the government itself and the administration of that government arises at the point where the voluntary dealings and relations between the individual and the government agencies assume a personal character in support of the particular agencies administering the government for the time being. To this class belong voluntary undertakings to provide a revolutionary administration with money or arms or munitions and the like. But the ordinary agencies, departments, and bureaus of the government must continue to function notwithstanding its principal administrative offices may be in the hands of usurpers, and in such a case the sale and delivery to these necessary and legitimate agencies of supplies, merchandise, and the like, to enable the government itself in its unpersonal aspect to function is a very different transaction from one having for its object the support of an individual or group of individuals seeking to maintain themselves in office. The character of each transaction must be judged and determined by the facts of the particular case.

6. A similar distinction arises in the field of international law. There are, on one side, agreements and understandings between one nation and another changing or even subverting its rulers, which are clothed with the character of a free choice, a preference, an approval, and which obviously undertake to bear the risks of such a choice. There are, on the other hand, many transactions to which this character is alien. Embassies, legations, and consulates of a nation in unrest will practically continue their work in behalf of the men who are in control of the capital, the treasury, and the foreign office—whatsoever the relation of these men to the country at large may be. Embassies, legations, and consulates of foreign nations in such capital will practically discharge their routine duties as theretofore, without implying thereby a preference in favor of any of the contesting groups or parties. International payments (for a postal union, etc.) will be received from such government; delegates to an international conference will often be accepted from such government. Between the two extremes here also there is a large doubtful zone, in which each case must be judged on its merits.

7. Facts and practice, as related to the Huerta administration in Mexico, illustrate the necessity of a cleavage in determining the validity or nullity of its acts.

8. In the field of international relations the distinction is apparent. Where preëxisting relations with government agencies continued under such circumstances as not to imply either approval or disapproval of the new

administration or recognition of its authority, these transactions must be treated as government transactions and binding on it as such rather than transactions had with a particular administration. The routine diplomatic and consular business of the nation continued to be transacted with the agencies assuming to act for the government and which were in control of the foreign office, the treasury, and the embassies, legations, and consulates abroad. Even the United States, though placing its stamp of disapproval in the most unmistakable manner on the act of Huerta in usurping authority, kept its embassy in Mexico City open for the transaction of routine business, entrusting it to a *chargé d'affaires*, and maintained its consulates throughout Mexico. Such relations, so maintained were entirely unpersonal; they constituted relations with the United Mexican States, with its government as such, without respect to the status of the individual assuming to act for the government.

9. This distinction was recognized in the decisions made by the Carranza administration as to the legality of the acts of the Huerta administration. Such acts as the registration of births, deaths, and marriages were practically undisturbed, because they were performed in the orderly functioning of the government quite independent of the recognition or non-recognition of the individuals exercising authority. These were unpersonal acts of the government itself as an abstract entity. It does not matter for the present argument, and it is not for the Commission to decide, whether the terms of the Carranza decree of July 11, 1916, are or not in all things to be commended; it is noticed here only to point out that it recognized the distinction between transactions with and by the government itself and transactions with and by the Huerta administration.

10. The same cleavage was recognized in connection with the financial transactions of the Huerta administration by later administrations of the Government of Mexico. The series of Mexican bonds issued during the Huerta régime the proceeds of which were applied to the payment of the interest on the preëxisting debt of Mexico have been uniformly recognized as valid, while other series of the same issue the proceeds of which are claimed to have been applied to the maintenance in power of the Huerta administration or to the purchase of arms, munitions, and the like have been repudiated. The Commission here expresses no opinion with respect to the application made by Mexico of the principle invoked in recognizing as valid one series of bonds and repudiating another series of the same issue. The matter is referred to here only to point out that the principle which the Commission applies in this case has been recognized and invoked by the Government of Mexico under administrations of unquestioned regularity and validity.

11. It is clear that the sale by the Mexican Government to and the purchase by the claimant Hopkins of postal money orders falls within the category of purely government routine having no connection with or relation to

the individuals administering the government for the time being. The facts as developed in the memorial and the briefs, which are not contested by the Mexican Agent, aptly illustrate the necessity of the distinction here made between acts of the Huerta administration in its personal character and acts of the government itself in its unpersonal character. From the facts so developed it appears that at the very time these postal money orders were issued the greater part of the States of Sonora and Sinaloa, from which they issued, was dominated by Carranza as First Chief of the Constitutional Army, while the City of Mexico, on which the orders were drawn, was dominated by Huerta. Yet the post offices in these two States under the domination of Carranza continued to issue money orders of the United Mexican States upon the postmaster in the Federal District of Mexico. In other cases that have been submitted to this Commission it is apparent that the government agencies functioning under the Huerta administration continued to carry out obligations under preëxisting contracts and otherwise functioned without reference to the change in administration. It also appears that when Huerta seized the reins of government which in his capacity as provisional president he undertook to administer he did not change the government machinery as it had been set up under President Madero, which continued to operate in all its parts in the service of the people, and the great majority of the personnel of all of the bureaus and agencies of the government remained unchanged and continued to discharge their duties to and in the name of Mexico. At no time did the government machinery cease to function, notwithstanding the change in the personnel of some members of its executive branch. To the extent that this machinery acted in the discharge of its usual and ordinary functions or to the extent that it received benefits from transactions of an unusual nature, Mexico is bound.

12. But it by no means follows that if the contracts of the claimant Hopkins, evidenced by postal money orders, should be treated as contracts with the Huerta administration in its personal aspects Mexico is not bound by such contracts. The question then arises, how far can an administration which seizes the reins of government by force and is illegal in its inception bind the nation? It will be borne in mind that an administration of illegal origin either operates directly on the central authority by seizing, as Huerta did, the reins of the government, displacing the regularly constituted authorities from their seats of power, forcibly occupying such seats, and extending its influence from the center throughout the nation; or it comes into being through attacking the existing order from without and step by step working toward the center. The acts of an organization of the latter type become binding on the nation as of the date territory comes under its domination and control *conditioned* upon its ultimate success. The binding force of such acts of the Huerta administration as partook of the personal character as contradistinguished from the government itself will depend upon its real control and paramountcy at the time of the act over a major portion of the territory

and a majority of the people of Mexico. As long as the Huerta régime was in fact the master in the administration of the affairs of the Government of Mexico its illegal origin did not defeat the binding force of its executive acts (award of 1901 in the Dreyfus case between France and Chile, Descamps et Renault, *Recueil international des traités du XXe siècle, an 1901*, 394). Once it had lost this control, even though it had not been actually overthrown, it would not be more than one among two or more factions wrestling for power as between themselves. Even while still in possession of the capital and therefore dominating the foreign office, the treasury, and Mexico's representatives abroad, its acts of a personal nature could not ordinarily bind the nation from the moment it apparently was no longer the real master of the nation. It is unnecessary in this case for the Commission to determine the exact time between February, 1913, and July, 1914, the turning point was reached in the ebbing power of Huerta. During the months of February (last half), March, and April, 1913, Huerta's power was paramount in the north, the center, and the south of Mexico notwithstanding uprisings in several States. The Huerta administration was not accorded recognition by any foreign government after June 1, 1913. During the period from January to July, 1914, inclusive, Huerta's power rapidly diminished, and it is not improbable that the alleged insult offered the American flag in March, 1914, resulting in America's military occupation of Veracruz was an unsuccessful endeavor on his part to turn the tide in his favor by appealing to the Mexican people to rally to his support against a foreign "enemy" (?). It therefore follows that in every case submitted to this Commission in which acts of the Huerta administration in its personal aspect are involved the Commission must consider the particular facts in that case and decide upon the actual binding force upon the Mexican nation of such acts.

The Carranza decrees of nullity

13. As the Commission holds that the contracts between the Government of Mexico and Hopkins, evidenced by the postal money orders which it issued to him, are unaffected by the character of the Huerta administration and are binding upon the United Mexican States as such, the question presents itself whether this binding force has from an international viewpoint been subsequently destroyed by the decrees issued by Carranza on February 19, 1913, and July 11, 1916. The Commission has no hesitancy in answering both questions in the negative. The first decree, being that of one State of the Union, Coahuila, could have no possible effect on or modify either the rights or duties of the Union itself. The second decree, even when considered as subsequently invested with the character of a law by the Mexican Congress, could not possibly operate unilaterally to destroy an existing right vested in a foreign citizen or foreign state or a preëxisting duty owing by Mexico to a foreign citizen or foreign state. The fact that it follows that foreign citizens may enjoy both rights and remedies against Mexico which its municipal laws

withhold from its own citizens is immaterial as will be hereinafter pointed out in paragraph 16.

14. From the foregoing the Commission concludes that Hopkins' contracts are unaffected by the legality or illegality of the Huerta administration as such, that they bind the Government of Mexico, that they have not been nullified by any decree issued by Carranza, and that they have not been and cannot be nullified by any unilateral act of the Government of Mexico.

Non-recognition as an estoppel

15. Has the American Government forfeited its right to espouse Hopkins' claim because in 1913 it warned its citizens against the "usurper" Huerta and never recognized his administration? The Commission holds that such warnings and such failure to recognize the Huerta administration cannot affect the vested rights of an American citizen or act as an estoppel of the right of the American Government to espouse the claim of such citizen before this Commission (see the award of Honorable William H. Taft, Sole Arbitrator between Great Britain and Costa Rica, October 18, 1923, reported in 18 (1924) AMERICAN JOURNAL OF INTERNATIONAL LAW, at pages 155–157). The position assumed by the American Government under the administration of President Wilson was purely political and was binding, even on that administration, only so long as it was not modified. It was an executive policy, which, so long as it remained unmodified and unrevoked, would close to the American Government the avenue of diplomatic interposition and intervention with the Huerta administration. It temporarily, therefore, rendered this remedy—diplomatic interposition or intervention—unavailable to an American citizen but it did not affect a vested *right* of such citizen. But non-recognition of the Huerta administration by the American Government under the Wilson administration was not dependent upon Huerta's paramountcy in Mexico. It meant that, even if it were paramount, it came into power through force by methods abhorrent to the standards of modern civilization, that it was not "elected by legal and constitutional means," and hence, while the *Government* of Mexico continued to exist and to function, its *administration* was not entitled to recognition.

Privileged status of foreigners

16. If it be urged that under the provisions of the treaty of 1923 as construed by this Commission the claimant Hopkins enjoys both rights and remedies against Mexico which it withholds from its own citizens under its municipal laws, the answer is that it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. The reports of decisions made by arbitral tribunals long prior to the treaty of 1923 contain many such instances. There is no ground to object that this amounts to a

discrimination by a nation against its own citizens in favor of aliens. It is not a question of discrimination but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens.

Decision

17. From the foregoing opinion it follows, and the Commission decides, that the allegations contained in the memorial filed herein bring this claim within the jurisdiction of this Commission. Assuming that such allegations are true, the Government of Mexico is bound to pay the claimant the postal money orders declared upon. The motion of the Mexican Agent to dismiss is therefore overruled. The running of time for filing the answer has been suspended from December 16, 1925, to March 31, 1926.

Done at Washington this 31st day of March, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
EDWIN B. PARKER,
Commissioner.
G. FERNANDEZ MACGREGOR,
Commissioner.

THE UNITED STATES OF AMERICA ON BEHALF OF THE HOME INSURANCE COMPANY, CLAIMANT, *v.* THE UNITED MEXICAN STATES (Docket No. 73)

Opinion and Decision, March 31, 1926

A government operating railroads in the territory under its jurisdiction is under no greater or different liability as a carrier of freight and passengers for hire than a private corporation operating the same railroads. In its capacity as carrier, Mexico, as between it and the owner of the goods carried, was subject to the laws of the Republic applicable to other public carriers. Under those laws a public carrier for hire is not liable for the loss or damage to shipments in its possession resulting from the acts of revolutionary forces, without negligence on its part.

Under the circumstances of this case the Government of Mexico held not liable for the value of two carloads of coffee seized by revolutionists while being held in a railroad warehouse at Puerto México, awaiting transshipment by steamer to New Orleans; nor did the Government of Mexico fail in the discharge of its duty as sovereign to take all reasonable measures to protect the coffee in question.

Claim allowed only for refund of pro rata portion of through freight prepaid from Puerto México, to New Orleans.

1. This claim is asserted by the United States of America on behalf of the Home Insurance Company, an American corporation, against the United Mexican States to recover the sum of $23,050.00 with interest thereon from May 28, 1924, on which date it is alleged the claimant paid under two policies of insurance the principal sum mentioned to Westfeldt Brothers, of New Orleans, Louisiana, an American mercantile partnership, composed

wholly of American nationals, to indemnify them for losses in transit of two cars of coffee, one originating at Huixtla, Chiapas (Mexico), the other originating at Tapachula, Chiapas (Mexico), both destined to New Orleans via Puerto México, Veracruz (Mexico).

2. The record as submitted is in some respects meager and incomplete and in other respects contradictory and confusing, but, giving due weight to the facts proven and their necessary implications, the Commission finds the facts as follows:

3. On November 23, 1923, Westfeldt Brothers of New Orleans placed an order with El Emporio del Café, S. A., of Mexico City, Mexico, a Mexican corporation for one car of coffee of the kind and grade and at the prices stipulated, to be paid for by the sight draft of El Emporio del Café, S. A., on Westfeldt Brothers at New Orleans, "insurance cared for by Westfeldt Brothers."

4. On November 27, 1923, Westfeldt Brothers placed another order with El Emporio del Cafe, S. A., for another car of coffee of different grades and prices, to be insured and paid for by the sight draft of El Emporio del Café, S. A., by Westfeldt Brothers at New Orleans, "insurance cared for by Westfeldt Brothers."

5. On November 30, 1923, in pursuance of the order of November 23, 1923, a car of coffee was shipped from the station of Huixtla, with ultimate destination New Orleans, covered by a through bill of lading issued by the National Railways of Mexico, consigned to shipper's order notify Westfeldt Brothers, New Orleans, and routed by the National Railways of Mexico via Puerto México and the Munson Steamship Line.

6. On December 4, 1923, in pursuance of the order of November 27, 1923, another car of coffee was shipped from the station of Tapachula, likewise covered by a through bill of lading with ultimate destination New Orleans, consigned and routed in the same way as the shipment mentioned in the preceding paragraph.

7. Both of these cars arrived at Puerto México on December 5, 1923, and on the following day the coffee was removed from the cars and placed in the railroad warehouse to await the arrival of a steamer of the Munson Line for transshipment to New Orleans.

8. The rail lines over which these shipments moved and the warehouse into which the coffee was removed and stored at Puerto México were operated by the Government of Mexico, which at that time had taken over and was operating all or practically all of the rail lines in the Republic of Mexico, most of which were owned by private corporations.

9. At the request of Westfeldt Brothers the claimant herein as of December 1, 1923, issued at Mexico City, through its manager for Mexico, a policy of insurance covering the first shipment, and on December 5, 1923, issued a like policy of insurance covering the second shipment, both in the usual form for the indemnification of Westfeldt Brothers against loss in

transit, with the usual limitations not necessary to notice here. Attached to each of said insurance policies in the form of a rider was a "War and Riot Clause" extending to Westfeldt Brothers, in consideration of an additional premium, indemnity against loss caused by "Rioters, Civil Commotion, Rebellion, Insurrection, Military Invaders, Military or Usurped Power or Martial Law, Intervention by Foreign Power or Powers, Robbery by Persons or Bands who take property by Force," but excluding from such coverage "any Acts or Proceedings of the Civil and/or Military Representatives of the Constituted Authorities for the time being."

10. Thereafter, on January 15, 1924, in consideration of an additional premium, the insurance under both of these policies was extended effective as and from January 12, 1924, to cover "loss of and/or damage to the property insured directly caused by Confiscation, Detention or Sequestration by the Constituted Authorities for the time being, whether local or Federal."

11. On or about December 5, 1923, a program was decided upon under the leadership of Adolfo de la Huerta having for its object the overthrow of the administration of President Obregón of Mexico. On December 6 de la Huerta publicly warned Obregón that he would meet the same fate as his predecessor (Carranza) if he continued in his present course, and soon thereafter it was reported that the military forces in several Mexican States, notably Chihuahua, Tamaulipas, Veracruz, Puebla, Jalisco, Michoacan, Guerrero, Oaxaca, Tabasco, Campeche, and Yucatan were in revolt against the Obregón administration and that the Federal officeholders in those States had been replaced by the adherents to the revolutionary movement. Adolfo de la Huerta was a man of influence and had a large following in Mexico. He had taken a prominent part with Carranza when the latter was First Chief of the Constitutionalist Army in launching and prosecuting an ultimately successful revolution against the Huerta administration in 1913 and 1914; later he, with General Calles and others, led a successful revolution resulting in the overthrow of the Carranza administration, after which de la Huerta became Provisional President; after the election of Obregón as President, de la Huerta became his Finance Minister in a cabinet in which General Plutarco Elias Calles held the portfolio of Minister of the Interior. In the fall of 1923 acute friction developed between de la Huerta and Calles, the latter an active and the former a passive candidate for the presidency. This developed into friction between de la Huerta and Obregón. On September 14, 1923, de la Huerta tendered his resignation as Finance Minister, which was immediately accepted. On October 18, 1923, he publicly announced his candidacy for the presidency, which was followed by charges by his political enemies of extravagance and misconduct in office as Finance Minister, which charges were publicly supported by President Obregón. The heat of political contest resulted in riots and bloodshed. A convention of the Coöperative Party was attended by more than 2,500 delegates from every state and territory except Lower California, including a

majority of the Chamber of Deputies. On November 23, 1923, this convention repudiated Calles and Obregón, two of the founders of the party, by choosing de la Huerta as its candidate for the presidency. He also had the support of several other political parties. With this strong political following de la Huerta took the field to forcibly overthrow the Obregón administration, which he claimed had been and was disregarding the legislative and judicial departments of the government and had armed political agitators to do its bidding without respect for life, liberty, or property. General Calles withdrew as a candidate for the presidency and took the field against de la Huerta and his followers in defense of the Obregón administration. By the middle of December the opposing armies were reported to be lined up on a 65-mile front in the State of Puebla. On December 15, 1923, the city of Puebla, the third largest in Mexico in point of population, was evacuated by the government troops and entered the next day by the followers of de la Huerta. The cities of Mérida and Progreso, both in Yucatán, were also reported to have fallen into the hands of the revolutionists. By the end of December, 1923, the revolutionists had advanced practically two-thirds of the way from Veracruz to Mexico City. About this time General Obregón took supreme command of his army and prepared to advance to Veracruz. The Government of the United States placed an embargo on all arms, ammunitions, and supplies destined to the rebel forces. At that time de la Huerta had set up at Veracruz an organization which he proclaimed as the provisional government of Mexico. Apparently from this time on de la Huerta experienced difficulty in raising funds with which to prosecute his campaign, and his organization began to crumble. His forces were defeated at Esperanza in January and on February 11, 1924, the Federal forces recaptured Veracruz. So vigorously were the operations against the insurgents prosecuted that by April, 1924, the revolution was practically suppressed. It appeared from the final message of President Obregón, delivered September 1, 1924, that the armed rebels had numbered approximately 56,000 including 25,000 deserters from the army, and that the suppression of the revolution had cost the Federal Government more than 60,000,000 pesos.

12. Among those who had deserted the Federal forces in December, 1923, to become followers of de la Huerta was Brigadier General Benito Torruco, who from time to time, between February 11 and March 10, 1924, seized at Puerto México the two carloads of coffee above-mentioned which were stored in the railroad warehouse at that port. He gave receipts therefor to the Terminal and Customs Agent of the railway there signed by him as "The General of Division, Chief of the Military Operations on the Isthmus."

13. While it does not appear that the rebel forces at and contiguous to Puerto México were numerically strong, it does appear that they were sufficiently strong to cut off all communication from Puerto México from December 6, 1923, to April 2, 1924. It further appears that prior to these

seizures the Terminal and Customs Agent of the railroad at Puerto México made an unsuccessful effort to forward this coffee to New Orleans by the steamship *Sveland*, as no steamer from the Munson Line was available for its transportation.

14. Based on the foregoing findings of fact, the conclusions reached by the Commission follow:

15. The contention that this Commission is without jurisdiction to hear and decide this case because it is predicated on the nonperformance of a contract obligation, and that claims of this nature are not embraced within the treaty in pursuance of which this Commission is constituted, is rejected for the reasons set forth in the Illinois Central Railroad Company case, docket No. 432, this day decided by this Commission.[1]

16. It is for each nation to decide for itself whether or not it will engage in owning and/or operating railroads or other transportation facilities. In this case it appears that at the time of the losses here complained of the Government of Mexico had taken possession of and was operating the railroads located in the territory under its jurisdiction. As such it was performing a governmental function, but it by no means follows that its liability as a carrier of freight and passengers for hire was in any respect greater than or different from that of a private corporation operating the same railroads. In its capacity as carrier Mexico, as between it and the owner of the goods carried, was subject to the laws of the Republic applicable to other public carriers. Under those laws it received and promptly and safely transported to Puerto México the shipments of coffee the loss of which gave rise to this claim. It was prepared to deliver these shipments to the Munson Line in accordance with the terms of the through bill of lading, but the Munson Line had no ship available to receive them at that port. The railroad's agent made an unsuccessful attempt to forward the coffee by another ship. Because of the cutting off of Puerto México from all mail and transportation communication with the outside world from December 6, 1923, to April 2, 1924, it was not possible for the carrier to move the coffee to a place of greater safety or to communicate with either the shipper or the purchaser. That Westfeldt Brothers as well as the claimant herein knew of the actual or threatened disturbed conditions in the territory through which those shipments must move in transit is evidenced by the fact that Westfeldt Brothers paid an additional premium in the first instance for war-risk insurance excluding acts of the constituted authorities and some five weeks later, but prior to the seizure of the coffee, they paid an additional premium to the claimant for insurance against loss caused by "confiscation, detention, or sequestration by the constituted authorities for the time being, whether local or federal." The de la Huerta revolution had been launched. General Torruco was in command of its military forces at Puerto México and contiguous territory when Westfeldt Brothers procured this

[1] Printed in this JOURNAL, Vol. 20, p. 794.

extension of insurance coverage from the claimant. Thereafter the coffee was seized and confiscated by General Torruco in his capacity as "Chief of the military operations on the Isthmus." Under the laws of Mexico a public carrier for hire is not liable for the loss or damage to shipments in its possession resulting from "casos fortuitos," which includes acts of revolutionary forces, without negligence on its part. In these circumstances the Commission decides that the Government of Mexico is not liable in its capacity as carrier for the loss of the shipments of coffee here involved.

17. But the Government of Mexico in its sovereign capacity owed the duty to protect the persons and property within its jurisdiction by such means as were reasonably necessary to accomplish that end. A failure to discharge that duty resulting in loss or damage to an American national would render it liable here, and the claim against it of such American national, if espoused and presented by the Government of the United States of America, would fall within the jurisdiction of this Commission. The question then arises in this case, Did the Government of Mexico fail in the discharge of its duty as sovereign to take all reasonable measures to protect the coffee in question? The Commission decides that the record as presented discloses no such failure. The de la Huerta revolt against the established administration of the Government of Mexico—call it conflict of personal politics or a rebellion or a revolution, what you will—assumed such proportions that at one time it seemed more than probable that it would succeed in its attempt to overthrow the Obregón administration. The sudden launching of this revolt against the constituted powers, the defection of a large proportion of the officers and men of the Federal Army, and the great personal and political following of the leader of the revolt, made of it a formidable uprising. President Obregón himself assumed supreme command. Through the vigorous and effective measures taken by the Obregón administration what threatened at one time to be a successful revolution was effectually suppressed within a period of five months from its initiation. General Torruco, who seized and personally receipted for the coffee in question was the military commander of the de la Huerta forces on the Isthmus, including Puerto México and the country contiguous thereto. He succeeded in holding this territory on behalf of the revolutionists under de la Huerta and against the established authorities of the Obregón administration. Communication between Puerto México and the outside world was cut off during a period of nearly five months. In these circumstances the Commission finds that on the record submitted the Government of Mexico, then under the administration of President Obregón, did not fail in the duty which in its sovereign capacity it owed to Westfeldt Brothers to protect their property.

18. From the record it appears that Westfeldt Brothers paid the Government of Mexico the through freight charges on the shipments of coffee in question from the points of origin to New Orleans and that the claimant

has reimbursed Westfeldt Brothers for such payment. The Government of Mexico in its capacity as carrier has performed the service which it contracted to perform up to Puerto México but not further. It is therefore obligated to pay to the claimant the division of the through freight charges from Puerto México to New Orleans, for which payment has been made but no service rendered. Upon the Government of the United States filing with this Commission on or before May 1, 1926, evidence satisfactory to the Commission of the amount due claimant under this decision an award will be entered for such amount in favor of the United States of America on behalf of the claimant against Mexico. Further than this, the Commission finds, the Government of the United Mexican States is not obligated to pay any amount to the Government of the United States of America on account of the claim herein presented.

19. Had the loss herein complained of occurred within the period from November 20, 1910, to May 31, 1920, inclusive, it would seem that the claim would have fallen within the jurisdiction of the Special Claims Commission constituted in pursuance of the Special Claims Convention between the United States and Mexico signed September 10, 1923, and effective through exchange of ratifications February 19, 1924. Articles II and III of that convention have no counterpart in the convention under which this Commission is constituted. It is not for this Commission to express any opinion with respect to the liability of Mexico under the evidence as presented by this record if the terms of the Special Claims Convention were applied thereto. It is proper, however, to call attention to the radical difference in the terms of the two conventions and to expressly state, for the guidance of the respective governments, that what is said in this decision and opinion can have no application to cases falling within the terms of the Special Claims Convention.

Done at Washington, D. C., this 31st day of March, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
EDWIN B. PARKER,
Commissioner.
G. FERNANDEZ MACGREGOR,
Commissioner.

The United States of America on Behalf of William A. Parker, Claimant, *v.* The United Mexican States (Docket No. 127)

Opinion and Decision, March 31, 1926

The espousal of a private claim by a government is not evidence of the nationality of the claim, which must be established by proof submitted in accordance with the treaty and the rules of procedure adopted by the Commission.

The technical rules of evidence obtaining under municipal law have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal.

The Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal law. On the contrary, it holds that it is the duty of the prospective agencies to coöperate in searching out and presenting to the tribunal all facts throwing any light on the merits of the claim presented. The parties before the Commission are sovereign nations who are in honor bound to make full disclosures of the facts in each case, so far as such facts are within their knowledge, or can reasonably be ascertained by them.

An interlocutory decree issued deciding on the record presented that the claimant is an American national, but reserving decision with respect to the ownership and amount of the claim and requesting the agents to coöperate in discovering the facts and to file evidence on or before July 1, 1926.

1. It is alleged in the memorial that William A. Parker, who was born and has ever remained an American national, was, on and prior to December 8, 1911, until March 27, 1918, engaged in the City of Mexico as a dealer in typewriters, typewriting and general office supplies and repair of typewriters; that on the last named date, he caused a corporation to be formed under the Mexican law, designating it Compañia Parker S. A.; that at sundry times between December 8, 1911, and March 27, 1918, claimant sold and delivered, or rendered services in the nature of repairs to, typewriters to various departments of the Government of Mexico, at prices which were agreed upon at the time of delivery or at the time the services were rendered; and that, after giving to the Government of Mexico all proper credits, there is due claimant $39,090.05 which remains unpaid. The claim of William A. Parker against the United Mexican States has, on his behalf, been espoused by the United States of America and submitted to this Commission for decision. A Mexican motion to dismiss the claim was overruled by this Commission on March 2, 1926.

Nationality of the claim

2. The nationality of the claim presented has been challenged on several grounds. In response to this challenge it is contended that when a government espouses a claim of one of its nationals against another government the private nature of the claim and the private interest of the claimant therein ceases to exist and the claim becomes a public claim of the espousing government. From this premise the proposition is deduced and pressed that the espousal of a claim by either government before this Commission and the allegation in the memorial of facts as distinguished from conclusions from which it would follow that the claim possessed the nationality of said government is *prima facie* evidence that it is impressed with such nationality, subject to rebuttal by affirmative evidence to the contrary which may be offered

by the opposing Agent. This contention is rejected by the Commission. It is clear that the treaty of 1923 does not deal with any government-owned claims but does deal throughout with private claims of citizens which have been espoused by their respective governments. Provision is even made in certain cases for a restitution of a "property or right . . . to the claimant" (Article IX of the treaty). However, the Commission does hold that the control of the government, which has espoused and is asserting the claim before this Commission, is complete. In the exercise of its discretion it may espouse a claim or decline to do so. It may press a claim before this Commission or not as it sees fit. Ordinarily a nation will not espouse a claim on behalf of its national against another nation unless requested so to do by such national. When, on such request, a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control, it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation, and must exercise an untrammeled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. But the private nature of the claim inheres in it and is not lost or destroyed so as to make it the property of the nation, although it becomes a national claim in the sense that it is subject to the absolute control of the nation espousing it.

3. The nationality of the claim is challenged on account of insufficiency of the proof offered in support of the American nationality of the claimant (a) because it is only supported by the affidavits of three witnesses, one of whom is the claimant, the second a brother of claimant and the third a friend of long standing who could not have positive information with respect to the fact of his birth; (b) because no birth certificate is presented, nor is its absence explained; and (c) because two of the affidavits were taken before an American vice consul in Mexico who is not authorized to administer oaths under the laws of Mexico where the affidavits were taken. Article III of the treaty of 1923 provides that "either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence desired in favor of or against any claim . . . in accordance with such rules of procedure as the Commission shall adopt." Section 1 of Rule VIII adopted by the Commission in 1924 provides that "The Commission will receive and consider all written statements, documents, affidavits, interrogatories, or other evidence which may be presented to it by the respective agents . . . in support of or against any claim, and will give such weight thereto as in its judgment such evidence is entitled in the circumstances of the particular case." Under these provisions of the treaty and the rules of this Commission, the affidavits of the claimant himself, his brother, and his friend, are clearly admissible in evidence in this case. Their evidential value—the weight to be given them —is for this Commission to determine and in so determining their pecuniary interest and family ties will be taken into account. But, the contention

made that the government is the sole claimant before this Commission, hence the personal, business, or other relations between the private owner of the claim and third persons whose testimony is here offered can be taken into account only by the claimant government in determining whether it will or will not espouse the claim, but not by this Commission, illustrates the extreme lengths to which the theory of the national character of the claim may be carried and is rejected. An unsworn statement may be accepted in evidence, but the weight to be given it will be determined by the circumstances of the particular case. Under the statutes of the United States, an American vice consul in a foreign land to which he is accredited is authorized to take the affidavit of an American citizen, and the mere fact that no such authority is conferred upon him by the laws of Mexico does not affect either the admissibility or the weight of the affidavits filed herein. In those jurisdictions where the local laws require registration of births a duly certified copy of such registration is evidence of birth in establishing either American or Mexican nationality by birth; but such evidence is not exclusive, and while ordinarily it is desirable that certificates of registrations of birth, which are usually contemporaneous with the fact of birth, should be produced when practicable in support of a claim of nationality by birth, or the absence of such certificate explained, it by no means follows that proof of birth cannot be made in any other way. While the nationality of an individual must be determined by rules prescribed by municipal law, still the facts to which such rules of municipal law must be applied in order to determine the fact of nationality must be proven as any other facts are proven. On the record as presented, the claimant himself, his brother, and a third witness all testified to facts from which no other conclusion can be drawn than that claimant was born, and has always remained, an American national. The Mexican Government offers no evidence in rebuttal, but relies on the insufficiency of this proof. On the record as presented, the Commission decides that the claimant was by birth, and has since remained, an American national.

4. The nationality of the claim was further challenged on behalf of Mexico on the ground that claimant on March 27, 1918, had conveyed all of his property, rights, and interests, including the claim here put forward, to the Compañia Parker S. A., a Mexican corporation and impressed with Mexican nationality; and therefore, in the absence of allegations and proof that this claimant had a substantial and *bona fide* interest in the said corporation and in the absence of presenting to this Commission an allotment to the claimant by said corporation of his proportion of the loss or damage suffered by him through the corporation, the claim on his behalf does not fall within the provisions of the treaty. On the hearing of this case the Commission requested both Agencies to present further evidence fully disclosing the facts with respect to this contention, in response to which request each Agent has presented a telegram. That filed by the Mexican Agent states in effect that the claimant Parker had conveyed all of his properties including this claim to

the corporation formed by him and bearing his name; while that filed by the American Agent is to the effect that this claim was never conveyed to the corporation. This unsatisfactory state of the record will be hereinafter referred to.

Rules of evidence

5. For the future guidance of the respective Agents, the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law," or "the general theory of law," and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted.

6. As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure. On the contrary, it holds that it is the duty of the respective Agencies to coöperate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented. The Commission denies the "right" of the respondent merely to wait in silence in cases where it is reasonable that it should speak. To illustrate, in this case the Mexican Agency could much more readily than the American Agency ascertain who among the men ordering typewriting materials from Parker and signing the receipts of delivery held official positions at the time they so ordered and signed, and who did not. On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is incumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be.

7. For the future guidance of the Agents of both governments, it is proper to here point out that the parties before this Commission are sovereign na-

tions who are in honor bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them. The Commission, therefore, will confidently rely upon each Agent to lay before it all of the facts that can reasonably be ascertained by him concerning each case no matter what their effect may be. In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision. The absence of international rules relative to a division of the burden of proof between the parties is especially obvious in international arbitrations between governments in their own right, as in those cases the distinction between a plaintiff and a respondent often is unknown, and both parties often have to file their pleadings at the same time. Neither the Hague Convention of 1907 for the Pacific Settlement of International Disputes, to which the United States and Mexico are both parties, nor the statute and rules of the Permanent Court of International Justice at The Hague contain any provision as to a burden of proof. On the contrary, Article 75 of the said Hague Convention of 1907 affirms the tenet adopted here by providing that "The parties undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the case."

8. In the present case, the sufficiency of the proof has been challenged (a) with respect to the sale and delivery by the claimant of typewriters and supplies to the Mexican Government, which involves (b) the power of the individual purporting to represent said government to bind it.

9. The allegations of sales made and deliveries effected to a designated agent at a designated place on the dates and at the prices specified and the failure of the Mexican Government to make payment are supported by the affidavit of the claimant, and the Mexican Agent has offered no evidence in rebuttal. The facts alleged are peculiarly within the knowledge of the respondent government, which should make a full disclosure thereof. It is suggested that due to disturbed conditions or otherwise many of the records of that government have been destroyed or misplaced, but it should seem that the respondent could at least definitely state whether or not the individual to whom claimant alleges he made deliveries was in its employ at the time and place designated and the actual or apparent scope of his authority. But whether the individuals to whom deliveries were made had, or had not, authority to contract for Mexico, certain it is that if the respondent actually received and retained for its benefit the property which the claimant testifies he delivered to it, then it is liable to pay therefor under a tacit or implied contract even if the individual to whom delivery was made had neither express nor apparent authority to contract for it.

10. Especially on account of the difficulty of ascertaining whether a person acting for either government was entitled to do so, there has been embodied in Article I of the treaty of 1923 a provision conferring jurisdiction over

claims originating from acts of officials "or others acting for either Government." Reading this provision in connection with that contained in the first clause of Article I, the Commission is of the opinion that this provision should be so construed as to include all claims against one government by the nationals of the other for losses or damages suffered by such nationals or by their properties, even when there is no evidence that they originate from acts of competent authorities, whether officials or others with a limited jurisdiction, but where there is merely evidence that they originate from acts of others acting for either government. Where the regularity of a government administration is doubtful, as the administration of Huerta 1913–1914, the quantum of proof required might be greater than in the case of an entirely regular and well-established government (compare Moore's Arbitrations, 3561). But in this case, the Mexican Agency has contented itself with the mere denial of authority without offering any evidence in support of such denial or throwing any light on the actual facts.

11. As pointed out in the foregoing paragraph No. 4, the proof with respect to the ownership of this claim is meager and unsatisfactory. While the Mexican Agent has failed to prove to the satisfaction of the Commission that claimant Parker has sold and conveyed this claim to a Mexican corporation and hence it might be justified in making an award in favor of the United States on behalf of the claimant, nevertheless the Commission is not satisfied with the evidence which has been presented to it on this issue, although the truth may be readily and definitely established.

Interlocutory decision

12. The Commission therefore decides the several questions presented in accordance with the foregoing opinion, but expressly reserves its decision with respect to the ownership of this claim and the amount thereof. The Agents are requested to coöperate in discovering the facts with respect to the ownership of this claim and the interest if any of the claimant Parker or the Compañia Parker S. A. or others therein and file evidence herein on or before July 1, 1926, fully disclosing such ownership. The Commission suggests that this evidence may take the form of a stipulation of facts signed by both Agents. Should it appear that this claim is the property of the Compañia Parker S. A. or other Mexican corporation in which the claimant Parker has a substantial and *bona fide* interest, an allotment by such corporation to the claimant Parker made in accordance with the treaty provisions may be filed and will be considered by the Commission.

Done at Washington this 31st day of March, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
EDWIN B. PARKER,
Commissioner.
G. FERNANDEZ MACGREGOR,
Commissioner.

SUPREME COURT OF THE UNITED STATES

LIBERATO ET AL. *v.* ROYER ET AL.[1]

Decided April 12, 1926

That part of the elective Workmen's Compensation Act of Pennsylvania which denies compensation to alien parents not residents of the United States, is not, as applied to a case of death without negligence or fault, at variance with the treaty with Italy, which guarantees that the citizens of each country shall receive in the States and Territories of the other the "protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs," etc., p. 538. (281 Pa. 227, affirmed.)

Error to a judgment of the Supreme Court of Pennsylvania which sustained a judgment (81 Pa. Super. Ct. 403) denying a claim under the State Workmen's Compensation Law.

Mr. Justice Holmes delivered the opinion of the court.

This is a claim for compensation under the Workmen's Compensation Act of Pennsylvania. It is for the death of the claimants' son in the employment of the defendants, without negligence or fault on the part of the latter, so far as appears. The son died unmarried and without issue, and the claimants, the plaintiffs in error, were wholly dependent upon him for support; but they were Italians living in Italy. The Compensation Board in obedience to a decision of the Court of Common Pleas awarded $820, and the award was affirmed by that court. The judgment was reversed by the Superior Court on the ground that the statute expressly provided that "alien parents . . . not residents of the United States shall not be entitled to any compensation," Sec. 310, and that the treaty of 1913 with Italy did not cover the case. 81 Pa. Superior Court, 403. The judgment was affirmed by the Supreme Court on the opinion below. 281 Pa. 227. As the plaintiffs contended that the treaty with Italy invalidated the above clause of the State law and gave them a right to recover, a writ of error was allowed.

Article 3 of the treaty as amended reads: "The citizens of each of the high contracting parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter." 38 Stat. 1669, 1670. This amendment was suggested by the decision in Maiorano *v.* Baltimore & Ohio R. R. Co., 213 U. S. 208, that under

[1] 270 U. S. (preliminary print), 535.

the laws of Pennsylvania a non-resident alien widow could not recover for the death of her husband caused by the defendant's negligence, although citizens of the State were given a remedy. Following this suggestion, the words of the amendment, if taken literally, deal only with death caused by negligence or fault. It is natural that they should be limited in that way. Apart from those States, of which Pennsylvania is not one, that very recently have substituted for the common law a general system of quasi-insurance, liability without fault is exceptional and usually has not been imposed for death except as the result of a voluntary arrangement. The statutes of Pennsylvania accord with this view of the treaty. They give to alien non-resident dependent parents the same right to recover damages for death due to fault that they give to citizens and residents. Then the Compensation Act offers a plan different from the common law and the workman is free not to come in under it. If he does, of course all benefits dependent on the new arrangement are matters of agreement and statutory consequences of agreements and cannot be carried further than the contract and statute go. One of those benefits is compensation irrespective of the cause of death, but it is confined to residents. Whether the workman's election to take advantage of the statute could be made a bar to a suit by his parents alleging a wrong is not before us here, but the right to recover without alleging fault depends on the terms of the Act.

We are of opinion that the treaty was construed rightly by the courts below. Were it otherwise, and if the excluding clause of the Compensation Act were held void, the question would arise whether the general grant to parents in the plaintiffs' situation could be extended to cover those whom it excluded in terms or whether, not withstanding a saving clause, Sec. 502, the whole grant would fail, on the ground that it could not be maintained as made and could not be assumed to go farther. But treaties are not likely to intermeddle with the consequences of voluntary arrangements, if the right is given, as here it was given by other statutes, to sue for death wrongfully caused, at least unless those arrangements made by third persons take away that right. It looks somewhat as if in the first stages of this case that right was supposed to be taken away; but, if so, the question was not saved, and the only question before us is whether the plaintiffs can recover under the Compensation Act, not whether they could recover for a wrongful death, which was not proved or even alleged.

Judgment affirmed.

SUPREME COURT OF JUSTICE, REPUBLIC OF PANAMA

THE REPUBLIC OF PANAMA AGAINST WILBERT L. SCHWARTZFIGER: INVOLUNTARY MANSLAUGHTER[1]

Opinion by Guardia, J.; all concurring—August 11, 1925

It is a principle of international law that an armed force of one state, when crossing the territory of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign, but to that of the officers and superior authorities of its own command.

In such case the government to which the army belongs is responsible for any damages that may be caused by the passage of the force, and for any violations of local law which it may commit. But individually its members remain subject to the jurisdiction of their own officers, and to the laws of the country to which they belong.

This exemption from the local jurisdiction is recognized by all civilized nations; and is not considered a diminution of their sovereignty or independence.

Article 3 of the Political Constitution of the Republic of Panama declares that the territory of the Republic remains subject to the jurisdictional limitations stipulated, or which may be stipulated, by public treaties with the United States of North America, for the construction, maintenance, or sanitation of any means of interoceanic transit.

By Articles 2, 3, 7, 9, and 23 of that treaty, the Republic of Panama grants to the United States, among other rights and privileges, the use, occupation and control of other waters and lands outside of the five miles on each side of the thread or center of the Canal, for *the operation, sanitation and protection* of the same (Art. II), conceding to the United States power and authority for the free use of its forces, land and Naval, for those purposes (Art. XXIII).

The treaty entered into between the Republic of Panama and the United States of North America, November 18, 1903, which grants certain rights to that country, forms part of the domestic law of Panama, and is obligatory upon the authorities of the Republic in cases coming before them for decision.

Statement

The morning of December 5, 1924, a workman (painter) fell from a scaffolding at France Field, Canal Zone, sustaining serious injuries. The military authorities of that command ordered a soldier, Wilbert L. Schwartzfiger, to hurry the injured man to Colon Hospital in a motor ambulance. To carry out the order Schwartzfiger had to enter the City of Colon, Republic of Panama; and in crossing the city on Avenida Bolivar the car, driven at a speed in excess of that permitted by local traffic regulations, struck one of the pillars of Lee Chong's business establishment between 8th and 9th Streets, and caused the death of Edwin Tucker, a Jamaican.

The judge of the Second Circuit, Colon, immediately took cognizance of the case, proceeded to make the usual investigation, and upon its completion transmitted the papers to the Superior Judge of the Republic, within whose jurisdiction the case fell under Article 116 of the Judicial Code.

The Superior Judge, after receiving the opinion of the Fiscal (district attorney), instituted criminal process against the soldier Wilbert L. Schwartzfiger, March 17th last, for homicide by imprudence or negligence (involun-

[1] Official Judicial Register, Republic of Panama, August 18, 1926 (Vol. XXIV, pp. 772–775). Translation and head notes by Lieutenant-Colonel William Cattron Rigby, Judge Advocate, United States Army; approved by Dr. Jorge E. Boyd, lately Attorney General, Republic of Panama.

tary manslaughter), under Article 318 of the Penal Code. Seven days later, by judgment March 24th, the judge, without quashing the process, ordered the proceedings terminated and filed.

The Fiscal appealed from that decision; and the Supreme Court, discovering some defects in the investigation, revoked the judgment and ordered a more complete investigation. The inferior judge completed the requisite details, and the case was then disposed of by the following judgment:

SUPERIOR COURT OF THE REPUBLIC, PANAMA, *June 18, 1925.*

This proceeding having been completed in accordance with the orders of the Supreme Court, and it appearing that an agreement is in force between the Government of the United States and the Republic of Panama under which soldiers, patrols, and officers of the Army and Navy of the United States enjoy in our Republic the rights of extraterritoriality, as do likewise the officers and agents of the National Police of our Republic in the territory of the Canal Zone in certain specified cases, it is considered that said Wilbert L. Schwartzfiger having been arraigned and tried by the military authorities of the Canal Zone upon the same charge upon which the prosecution in this tribunal is based, all proceedings against him in this court ought to be terminated because the matter has been adjudicated, in accordance with the agreement above mentioned and with the maxim of the Roman law; *res judicata pro veritate habetur.*

For the above reasons, and in disagreement with the opinion of the Fiscal, who requests that these proceedings be transmitted for proper action to the Secretary of Foreign Relations of the Republic, but not considering that to be the correct procedure, IT IS ADJUDGED by the court, administering justice in the name of the Republic of Panama, that all proceedings against the said soldier-chauffeur of the Army of the United States of North America, quartered in the Canal Zone, be terminated, and that these papers be filed in accordance with the previous notation.

To be registered and published.

J. F. DE LA OSSA.

ALEJANDRO ORTIZ, *Clerk.*

An appeal having been prayed from that judgment by the Fiscal and allowed, and the papers received in this court, they were transmitted to the Procurador General (Attorney General) of the Republic,[2] who, in his opinion No. 530 of April 13 of the present year, makes a full and complete study of the case in all its legal aspects, in its relations to international law, as well as to the juridical situation created in our Republic by the Canal Treaty of November 8, 1903, between Panama and the United States.

Opinion

It now devolves upon the court to decide this appeal.

By the evidence of Major General William Lassiter, Commanding General of the American Army in the Canal Zone, the following facts are established:

1. That Wilbert L. Schwartzfiger is a soldier of the American Army, belonging to Pursuit Squadron No. 24, Air Service, France Field, Canal Zone;

[2] Dr. Jorge E. Boyd, Procurador General (Attorney General) of the Republic of Panama, June, 1921, to October, 1926.

2. That on December 5th last, Schwartzfiger received orders from superior authority to take a laborer (a painter), injured by a fall from a scaffolding, to the hospital in a motor ambulance belonging to the American troops at France Field; that in carrying out his orders it was necessary for Schwartzfiger to enter the City of Colon, Republic of Panama; and that in crossing that city by Avenida Bolivar, in the discharge of his duty, Schwartzfiger's car struck one of the pillars of the building where the commercial establishment of Lee Chong is situated, and thereby caused the almost instantaneous death of the Jamaican, Edwin Tucker; and

3. That the orders given to the soldier Schwartzfiger were given to him in his official capacity and by his immediate superior possessed of authority to give them, and in the military service.

These facts being established, it is necessary to determine whether the accused was, or was not, by reason thereof, entitled to the immunity given by international law and recognized by Article 5 of our Penal Code.

Article 3 of the Political Constitution of the Republic of Panama declares that the territory of the Republic remains subject to the jurisdictional limitations stipulated, or which may be stipulated, by public treaties with the United States of North America, for the construction, maintenance, or sanitation of any means of interoceanic transit.

The Constitution was adopted February 15, 1904, and before that time, on November 18th of the preceding year, the Republic through its representative, P. Bunau Varilla, had signed a treaty with the United States of America for the construction, operation, protection, and sanitation of the Panama Canal, which was ratified by the Provisional Junta Government the 2nd of December of the same year.

By Articles 2, 3, 7, 9, and 23 of that treaty, the Republic of Panama grants to the United States, among other rights and privileges, the use, occupation and control of other waters and lands outside of the five miles on each side of the thread or center of the Canal, for *the operation, sanitation and protection* of the same (Art. II), conceding to the United States power and authority for the free use of its forces, land and naval, for those purposes (Art. XXIII).

In accordance with the text of that treaty, the Canal Zone authorities may employ their forces, assigned for the protection of the Canal, to assure the security, operation and sanitation of the same, and in such case those forces, when acting in the name or on behalf of the Government of the United States, are subject to the authority and jurisdiction to which they belong, and not to our national authorities; nor to both simultaneously, because such a double jurisdiction is contrary to law.

It is a principle of international law that the armed force of one state, when crossing the territory of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign, but to that of the officers and superior authorities of its own command.

In such case the government to which the army belongs is responsible for any damages that may be caused by the passage of the force, and for any violations of local law which it may commit. But individually its members remain subject to the jurisdiction of their own officers, and to the laws of the country to which they belong.

This exemption from the local jurisdiction is recognized by all civilized nations; and is not considered a diminution of their sovereignty or independence.

Upon this topic, the Supreme Court considers it advantageous to transcribe the following pertinent parts of the opinion of the Procurador General de la Nacion:

The principal exemptions are:

1. The inviolability of foreign sovereigns when they enter the national territory pursuant to prior permission;
2. The immunity enjoyed by diplomatic agents accredited to civilized nations;
3. The cession of part of the territorial jurisdiction implied in granting permission for the passage of troops of another state.

With respect to this last, although the sovereign may not have expressly declared a renunciation of his jurisdiction in favor of the army to which he has conceded the right of free passage, while it remains in transit, nevertheless he must be considered to have done so, because if, on the contrary, he should undertake to exercise his own jurisdiction over it, he would be held responsible for committing an act violative of his good faith and which indeed would destroy the very object of the free passage, diverting a part of the military force of an independent foreign nation from the purposes and objects for which it was intended, and withdrawing it from the control of its sovereign whose power and security might well depend on his retention of the exclusive command and free disposition of that force. Viewed in this light, the permission of free passage implies a complete renunciation of local jurisdiction over the troops during their passage, so that they will remain subject during that time to the exclusive control of their own officers, and correspondingly exempt from the local jurisdiction, and allowing to their officers the necessary freedom to impose the discipline and inflict the penalties required to maintain good order.

Military forces enter the territories of a friendly nation from time to time; sometimes to cross from one point to another of their own territory; sometimes as allies in a mobilization for the purposes of a campaign, or to afford relief for a garrison. In cases of the first class, those of the frequent passage of soldiers, it is customary to enter into regulatory conventions, to render the transit as little onerous as possible to those dwelling in the places to be crossed, establishing their duties and obligations by detailed regulations. In conformity to such agreements, offences committed by soldiers against inhabitants are judged by the military authorities of the country to which the troops belong.

Although undoubtedly such cession of jurisdiction on the part of the local authorities in favor of foreign military forces in transit occasions great inconveniences, yet the existence of a double jurisdiction over them while in a foreign country would be incompatible with the discipline of the army: for which reason it is universally admitted that not only the officers of troops engaged in passing through the territory of a friendly nation with which there exists no convention, but also the officers of troops who may be stationed in such a country, retain in principle full and exclusive jurisdiction over offenses committed by members of the army subject to their command.

"When an independent state," says the eminent Argentine writer, Carlos Calvo (*Le droit Internationale Theorique et Practique*, Vol. 3, p. 341), "grants a foreign army permission to cross or to remain in its territory, the persons composing that force, or incorporated into

it for the time being, are entitled to the prerogatives of extraterritoriality. A permission of that nature implies, in effect, on the part of the government which extends it, the tacit abandonment of its jurisdictional duties, and the concession to the foreign general and officers of the exclusive privilege of maintaining discipline among their soldiers, and of being the only ones empowered to take cognizance of any offenses that may be committed by them. It is easy to understand the dangers and inconveniences to which the troops would be exposed in the passage if they should be subjected to the direction and police powers of foreign authorities." (*Vide* Wheaton, Elements of International Law, Part 2, Ch. 2, sec. 9; Phillimore, Com., Vol. 1, sec. 341; Lawrence, Elements, by Wheaton, note 68; Fiore, *Droit Penal Internationale;* Hall, International Law, sec. 56, pp. 206 and 198; Wharton, International Law Digest, sec. 13; De Martens, *Nouveau Rec.*, Vol. 4, sec. 321, p. 60; *ib.*, Vol. 6; Woolsey, International Law; Rivier, *Principes de Droit Internationale*, Vol. 1, p. 333; Moore, International Law, Vol. 2, p. 559, sec. 251.)

The Dean of the Faculty of Law of Toulouse (Henri Bonfils, *Droit International Public*, p. 188, sec. 336), referring to this point says:

> The right of jurisdiction, a consequence and attribute of the power of local sovereignty, is limited by the right of extraterritoriality. By this term it is customary to designate certain immunities from public law which exempt certain persons from the jurisdiction of the state in which they happen to be. The expression "extraterritoriality" is consecrated by usage, but is not appropriate. It appears to imply that those persons are to be considered as though they had never left the territory of the country from which they came; but that is a dangerously inaccurate concept, and ought to be rejected, because it is too absolute in character and leads to inadmissible consequences, for instance, that acts in which a person entitled to that exemption has participated are to be judged by the law of his domicile, and are not subject to the rule of private international law that *locus regit actum*—a consequence rejected by all the world.
>
> The expression "immunity from jurisdiction" is far more exact and more correct. It indicates a privilege based upon the necessity of protecting the liberty of speech and of action of certain persons, *for the sake of the independence of the state to which those persons belong.*
>
> That immunity from jurisdiction is enjoyed by the Pope, by sovereigns in transit, by diplomatic agents and certain consuls, by *the officers and crews of ships of war* that have entered a port or roadstead of another Power, and *by the officers and soldiers composing a military force authorized to cross the territory of a foreign state.* (*Vide* Feraud-Giraud, *Etats et Souverains*, etc.).
>
> This immunity consists in exemption from local jurisdiction, civil or criminal; but not from the application of laws relating to the acquisition of civil rights.

The great North American jurist, Chief Justice Marshall of the United States Supreme Court, in the celebrated case of *The Schooner Exchange* (7 Cranch, 116, 137, 138, 139), enunciated the following rule which has been followed ever since by the courts and governments of that country:

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete, exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.
>
> 1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory. . . .
>
> 2nd. A second case, standing upon the same principles with the first, is the immunity which all civilized nations allow to foreign ministers. . . .
>
> 3rd. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

(*See* Twiss, Law of Nations, Vol. 1, p. 228–9; Hall, International Law, Sec. 54; Moore, International Law Digest, Vol. 2, p. 558.)

International conventions creating juridical obligations for the purpose of fostering commerce and for the mutual benefit of states, create new rights and duties that change or modify domestic institutions, adapting them to the necessities of civilization. If, by

reason of the interdependence which such conventions establish, the sovereignty of the state may be considered limited in certain respects, nevertheless the state in return is benefited in its development and security.

While international law deals only with states; yet the treaties which they sign become part of their domestic public law, and their tribunals are obliged to take cognizance of and apply them in cases submitted for decision, even though contrary to the private law of the land.

The treaty entered into between the Republic of Panama and the United States of North America, November 18, 1903, which grants certain rights to that country, forms, therefore, part of our domestic law, and is obligatory upon the authorities of the Republic in cases coming before them for decision.

Inasmuch as it appears that the soldier, Wilbert L. Schwartzfiger, a member of Pursuit Squadron No. 24, Air Service, France Field, when he entered the City of Colon, the morning of December 5th past, driving a wounded workman in a military motor ambulance of the American Army, did so in his official capacity, in the discharge of his duty, and by virtue of express orders of his superiors, which they were authorized to give, it follows that it is not possible, as a matter of law, in view of the provisions of the above mentioned treaty, and because of the lack of jurisdiction of the national courts over him, to hold him criminally responsible for the death of Edwin Tucker; since Schwartzfiger, acting under the direction of his government, was clothed with the immunity from penal process recognized by Article 5 of the Penal Code; and because, therefore, cognizance of, and jurisdiction over, the matter belongs to the authorities of the Canal Zone.

The promptitude displayed by the judge of the Second Circuit of Colon in the initiation and prosecution of this investigation, by which it has been possible to establish the facts in this case, is laudable. In every analogous case it is indispensable to institute an inquiry into the facts in order to determine what authorities should take cognizance of the case.

For the reasons above stated, the court in *Sala de Decision* (*en banc*), concurring with the opinion of the Procurador General, administering justice in the name of the Republic and by authority of the law, DECLARES that, since cognizance of the matter charged against Wilbert L. Schwartzfiger pertains to another jurisdiction, the judicial authorities of the Republic of Panama have no power to judge the accused.

To be engrossed, published, and returned.

J. D. GUARDIA.
MANUEL A. HERRERA L.
OSVALDO LOPEZ.

L. SOSA, *Clerk*.

BOOK REVIEWS AND NOTES[1]

Der Inhalt des Modernen Völkerrechts und der Ursprung des Artikels 10 der Völkerbundsatzung. Von Dr. jur. J. C. Baak. Berlin: Franz Vahlen, 1926. pp. xvii, 237. Index.

This is Number 6 of the *Völkerrechtliche Monographien* edited by Drs. Schücking, Strupp and Wehberg. The title fairly indicates the contents of the volume, if one adds the explanation that the "origin of Article 10 of the Covenant of the League of Nations" is treated by Dr. Baak, not primarily with a view to its historical origin, but rather for the purpose of showing the content and nature of international law, its defects, the confused methods of approaching the subject, and the way to a more just conception of this branch of jurisprudence. He proceeds upon the theory that the international jurist need not be confined to the accepted standards of method, valuation and criticism; and in accordance with this principle he advances new ideas and draws some new distinctions that are important. His general position may be indicated by his definition of international law as "constitutional international law" (p. 15) and of the Covenant of the League as "a definite part of the international legal order primarily universal in character" (p. 60).

Dr. Baak develops his thesis with uncompromising logic applied to the following subjects: fundamental principles and the system of modern international law; the legal character of the League of Nations and of Article 10 of the Covenant; the ideas of President Wilson; the adoption of Article 10 at the Peace Conference; interpretation and later development of Article 10; the political balance of power; and from his investigation and study he draws certain conclusions which he summarizes in a final chapter. Among the more important and outstanding features of the work are his distinction between the validity or authority of international law and its content; his rejection of the "dogma of sovereignty" and also of the commonly accepted distinction between international and municipal law, holding at certain points, and differing at others, with Krabbe and Duguit. Concerning Article 10 of the Covenant, he concludes that it could not be construed as a concrete legal norm, and that it could not have been intended to preserve the political independence and territorial integrity, but primarily as a protection against external aggression and the maintenance of the *status quo*, in a word, that it is not primarily concerned with justice. In general, this monograph may be characterized as a study in the nature and methodology of international law. It is a philosophical and stimulating study that may be commended

[1] The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes. — ED.

not only to the teacher of international law, but also to the student of general jurisprudence and political theory.

KARL F. GEISER.

The Genesis of the World War. By Harry Elmer Barnes. New York: Knopf, 1926. pp. xxvii, 750.

Sarajevo, A Study in the Origins of the Great War. By Robert W. Seton-Watson. London: Hutchinson & Co., 1926. pp. 303. Index. 18 shillings net.

These two books are so very different as to invite sharp comparisons. The first attempts to cover the whole field of the preliminaries to the World War, developing certain theses to points where the author regards them as definitely established. All the important states are criticized according to their relative responsibility for the World War; Austria and Germany are relieved in general from their burden of "war-guilt," which is to be placed on the shoulders of France, Russia and England. Supported by copious notes and citations (the latter sometimes rather general), there is a certain impressiveness developed that is enhanced by the atmosphere of confident assurance. The other is a modest though authoritative-appearing work that traces back the most important, or one of the most important, causes of the war to the soil out of which it arose. The author, a specialist in this field, has given us a skilful and scholarly presentation of his material, inspiring thereby considerable confidence in his conclusions. He has very critically used strong authorities and has demonstrated the amount of solid support upon which these conclusions rest, not merely from English and Slavic, but from many German writers as well. More limited in scope, Seton-Watson's study is more convincing than Barnes' discussions over the wider area. Naturally it seems less superficial on vital points; it is less hurried in their treatment. One gradually realizes how very close the author has put himself to the events he describes. He does not rely exclusively upon diplomatic papers or inferences from them; he has consulted and cross-examined eye-witnesses themselves, or at least those well-acquainted with the facts. With all its evident drawbacks, such investigation does supply material seldom or never reached in any official documents.

If Professor Barnes seems constantly to present new and startling ideas, or old ideas from a new view-point or in a new, dazzling and alluring dress, Professor Seton-Watson unveils fact after fact unknown or apparently little known to most students of modern history. The Austrian forgeries, the workings of the Balkan policy of Austria-Hungary, the various Serbian patriotic organizations, the Jugo-Slav revolutionary movement, the part played by Rumania, etc., etc., all appear in their proper setting. Wherever possible Professor Barnes uses the word "Serbian" in connection with the Sarajevo plot, even where "Serb" or "Bosnian" would be more accurate. Of course the fact that so many guilty persons were Austro-Hungarian subjects is the

last thing that the Austro-Hungarian Government of old wanted to have advertised. But even today the film of a great peace organization still states that the Archduke was assassinated by a "Serbian."

Concerning two authorities at least, the two authors differ decidedly: Miss Edith Durham and Herr Wegerer of *Kriegschuldfrage*. Professor Barnes (p. 173–174) has a rather general defence for both; Seton-Watson (pp. 26, 42, 127, 138, 140, 149) gives specific grounds for his criticisms. Others much trusted by Barnes are Bogicevic (see *Sarajevo*, p. 56) and Dr. Leopold Mandl, whom Barnes calls (p. 169) "the alert Austrian publicist," but whose partisan and dubious position Seton-Watson exposes (pp. 27, 154). On the whole, Seton-Watson avoids somewhat better any reliance upon polemical or partisan writers of this stamp. Professor Hermann Kantorowicz of Baden, in his review of *Sarajevo* (Slavonic Review, July, 1926, pp. 205–210), strongly supports Seton-Watson.

Some important distinctions are not made by Professor Barnes. France and Russia, even Belgium and England, might conceivably make preparations for a war that *might* come without actually "willing" that war. France might regard the loss of Alsace-Lorraine as not irretrievable, though guiltless of a deliberate plan to provoke a war for its recovery. Poincaré in fact was bound by permissible and imperative political sanctions to see to it that any alliance with Russia definitely fixed the recovery of Alsace-Lorraine from Germany as a joint demand to be insisted upon in case war should come. That is quite a different thing from deliberately developing an alliance for an aggressive war. Again, knowledge of the Sarajevo plot possessed by the Serbian cabinet, together with such failure to warn Austria as is charged by Jovanovič against that cabinet, is not the same thing as "plotting the murder of the Archduke." When Professor Barnes claims that Seton-Watson admits "that the Serbian Government must be held responsible for having plotted an assassination designed to advance Serbian national aspirations through provoking a European war," he goes beyond Seton-Watson's words (quoted by Barnes on p. 167 and in *Sarajevo*, pp. 154–155). Knowledge that others are plotting the murder of the Archduke is not the same as plotting the murder oneself. But in this evaluation of the Jovanovič "revelations," as well as in the Prochaska affair, we have but two of several instances where Western psychology breaks down in dealing with Eastern European peoples and occurrences.

Professor Barnes makes certain interesting assumptions in regard to submarine warfare "which *certainly*[1] cannot be regarded as in any sense more atrocious in fact or in law than those English violations of neutral rights which had produced the submarine campaign" (p. 594). He asserts also that the British illegal blockade *unlawfully* cut off our sales of war materials to the Central Powers (p. 606), that "it is *beyond question* that as a naval

[1] The *italics* are the reviewer's.

auxiliary, as a British ship warned of her danger in the war zone, and as a *warship* carrying munitions, she lost *about all* of her immunities as a merchant ship (p. 611), and the rapid sinking of the *Lusitania* "was something unforeseen by naval engineers or the German naval authorities" (p. 613). Professor Barnes readily accepts, also (p. 612) at face value the German warning to passengers on the *Lusitania*, and attempts to show that they were violating an American statute by sailing on a British ship laden with explosives (p. 643). England is accused of wanting the *Lusitania* sunk in the same way that she desired to have Belgium invaded (p. 614, no authority cited); another good example of a rather wild, bitter, and partisan statement.

If space were available and it were proper to do so, proposition after proposition presented by Professor Barnes affecting the "guilt" of every country mentioned and almost every important and vital event of the ten years preceding the entry of America into the World War would be open to challenge. But this is a review and not a debate. The reviewer must be content with questioning Professor Barnes' conclusions on the *Lusitania*, on Germany and Belgian neutrality, the French plan to regain Alsace-Lorraine, the Sarajevo murder, Morocco, etc., etc. After all, the point here made against Professor Barnes is not that he is absolutely and completely wrong, but that he has asserted as conclusively proved, propositions that are by no means out of the questionable class.

ARTHUR I. ANDREWS.

Traité Élémentaire de Droit International Public. By Amédée Bonde. Paris: Librairie Dalloz, 1926. pp. 566.

Das Völkerrecht in seinen Grundzügen Dargestellt. By E. v. Waldkirch. Basel: Helbing & Lichtenhahn, 1926. pp. 420.

Upon no other question are scholars in the field of international law more divided than upon the scope and method of a text-book on that subject. The juridical basis of international law, its sources and evidences, its codification and its sanctions, the "persons" subject to it and their alleged rights, —these are but the first items in the list of disputed topics. One therefore turns with expectant interest to each new treatise published since 1920 in the hope that at last a logical theory and a satisfactory classification may have been worked out. In neither of the present volumes are questions of scope and method brought to the fore. Both are excellent manuals of the type in which legal theory is subordinate to a practical exposition of the more important facts, and both will serve a very useful purpose in putting before the student the more recent developments of international law and in correlating these new facts with the established rules of law.

Dr. Bonde, whose object is to popularize "a subject of such growing importance," follows the traditional classification of the older French writers, omitting questions of technical interest only and emphasizing general prin-

ciples and their more important applications. The seven parts of the volume deal successively with states, the sphere of state sovereignty, the rights and duties of states and the restrictions upon their sovereignty, the latter title including a study of the League of Nations, sovereignty over persons, peaceful relations between states, and international disputes and their settlement. The author's treatment of his various topics is accurate and scholarly, the only exceptions which the reviewer has found being an occasional reference to Germany, as on p. 385, in terms suggestive of Art. 231 of the Treaty of Versailles. The style throughout is clear and graphic, the distinguishing mark of most French treatises.

Dr. Waldkirch is less conventional in his classification of the subject-matter. He rejects the traditional division of the law into "formal" and "material" law and substitutes in its place a more simple and practical classification which presents, first, the legal foundations of international law, next the general principles by which the international community is governed, including forms of organization and agencies of intercourse, then international relations in time of peace, and lastly international disputes and their settlement. The result is that, without introducing any novel theories, the author has succeeded in presenting his material in an original and admirably practical way, which will not only simplify for the student the study of existing conditions, but will open the way for a discussion of the practical methods by which international law may be developed or "codified." Part III, for example, dealing with international relations in normal times of peace, shows us within the brief compass of some sixty pages, first the technical means of commercial and social communication and the rules governing the same, and then the various interests to which the law gives protection. This is followed by a succinct but clear statement of the rules and procedure governing the so-called "conflict of laws."

Dr. Waldkirch is to be congratulated on having produced a text which, apart from its uses in the German class-rooms, must be of great service to teachers of international relations in other countries in suggesting to them ways in which their subject, in the collegiate courses, may be given a more practical bearing and awaken a more specific interest on the part of their students.

C. G. FENWICK.

India. By Sir Valentine Chirol. New York: Charles Scribner's Sons, 1926. pp. vii, 354. Index. $3.00.

In the volume before us, Sir Valentine Chirol, veteran British journalist and author of several previous books on India, takes us over some much traveled ground, as also into some new territory but recently opened up. The main interest of the work does not, however, lie in any new viewpoints or opinions, but rather in the fact that it is a general survey of the author's matured views on the subject of which it treats.

He begins with "Bird's-Eye View of India," which is described as a nation "still in the making." He holds the complicated social and religious system known as Hinduism, of which caste is the cornerstone, to be the bedrock of Indian civilization. The evils of the caste system are well described in Chapter II. "Next to Hinduism, Islam is the greatest force that shaped the history of India before the advent of the British, and it is still a great force today. . . . But Islam has not wholly resisted the subtle influence of an Indian atmosphere" (Ch. III, p. 35). Chapter IV deals with the "Governing Principles of British Rule." The guiding principle was enunciated by Burke when he declared that "all political power which is set over men . . . ought to be . . . exercised ultimately for their benefit," and that the "rights and privileges derived therefrom" constitute "in the strictest sense a trust." It is claimed that in India the British people have never deliberately departed from this principle of trusteeship, though one important limitation is noted, *viz.*: that it can not be fully applied to the 700 (more or less) Native States which are under direct British administration.

Chapter VIII deals with the "Tangle of Western Education," which the author says has been for India "the tree of knowledge of good and evil." His main conclusion (pp. 144–45) is that "with all its short-comings and in spite of the many blunders which must be laid to the door of those, whether Europeans or Indians, who controlled the system, Western education cannot be called a failure when it has produced an intellectual élite capable of playing such a part as it does today in modern India. It has shown that Indian brains, when given a fair chance, are no whit inferior to European brains." In subsequent chapters, such as "The Great War," "The Industrialization of India," "The Non-Coöperation Movement" (including an account of the Caliphate movement), "India's New Constitutional Charter" of 1919 (initiating that "ingenious but delicate system of equipoise" known as The Dyarchy into the provinces), etc., the author gives us an account of more recent movements and developments.

In conclusion, it may be said that this work achieves his purpose fairly well, the purpose as stated being to "trace the growth and reactions of the great forces . . . which have made India what she is today." Though rather conservative, he appears impartial and sound (aside from his astonishing fear of Bolshevism). Though severely critical of some phases of British policy, particularly the neglect of rural education, he is a strong believer in British rule in India, at least for the present. But he insists that it must be administered not primarily in the interests of British imperialism, but as a trust for the benefit of the Indians themselves. Above all, just as "British dominion in India was established not by the sword alone," so today "it would be folly for us to talk of force as a solution of our Indian difficulties" (pp. 336–37).

AMOS S. HERSHEY.

The Roots and Causes of the War (1914–1918). 2 Vols. By John S. Ewart, K. C., LL.D. New York: George H. Doran Co., 1925. pp. xxxvi, 676; x, 677–1204. $12.50.

Mr. Ewart is a distinguished Canadian jurist, and his examination into the roots and causes of the World War shows evident care and a spirit of detachment. He well realizes that such a conflict was the resultant of forces that had been working for generations, and his discussion of these ultimate causes is painstaking and sincere. Some American historians, such as Professor Sidney B. Fay and Professor Carlton J. H. Hayes, have striven to interpret the outbreak of the World War in terms of nationalism, imperialism, and militarism. To this unholy trinity the unnumbered woes of that dire struggle may be traced. Mr. Ewart gives scant consideration to the development of nationalism, and his treatment of imperialism and militarism leaves much to be desired.

Mr. Ewart is essentially a lawyer, and his discussion is a good legal brief, but it is not an exhaustive, well-balanced interpretation of the vast amount of source and secondary materials relative to the causes of the World War. There is an overwhelming amount of evidence that Mr. Ewart either ignores, or because of linguistic handicaps, was unable to evaluate. It is hardly possible for any investigator interested in that much-mooted question, war responsibility, to confine his research to books and documents written in French, Italian, and English. Not only have both Austrian and German publicists presented evidence too important to be neglected, but the German Foreign Office documents that have been published in that invaluable series, *Die Grosse Politik der Europaischen Kabinette, 1871–1914*, are of fundamental value.

Mr. Ewart's discussion of Russian mobilization would have been immeasurably improved had he given only the most cursory examination to the important and pertinent volumes by Hoeniger, Frantz, and Dobrorolsky, the valuable articles in the German monthly, *Die Kriegsschuldfrage*, and the journal of the Russian Foreign Office, translated by Major W. Cyprian Bridge under the title "How the War Began in 1914." The policy of Austria in the Balkans is presented without any reference to the well-known volumes of Friedjung, Sosnosky, Charmatz, and Fraknoi, and in dealing with the so-called Bosnia-Herzegovina root he makes no use of the monographs by Spalajkovic, Cvijic, Markovic, and Gjorgjevic, while the rôle of Andrassy is developed with never a reference to Wertheimer or to Fournier. Mr. Ewart's evaluation of Austrian policy since 1900 is lamentably weak. Not only are the general accounts of Friedjung, Bibl, and Sosnosky passed over, but the important and intimate volumes by Szilassy, Hoyos, Musulin, Margutti, Auffenberg, Conrad, Kanner, and Kiderlen-Wächter are apparently unknown to Mr. Ewart. It is to be regretted that in discussing the personality of the Archduke Francis Ferdinand, his murder at Sarajevo, and the

responsibility for the crime Mr. Ewart's study is confined within the most narrow limits. The illuminating volumes by Conrad, Nikitsch, Szillassy, Auffenberg, Margutti, Montgelas, Gooss, Bilinski, Pharos, Jevtić, Wendel, Stanojević, Lazarević, and Mandl, and the shorter studies by Professor Lammasch and Professor Seton-Watson are all ignored.

In other words, it is only too apparent that Mr. Ewart is not a trained historian, and his imposing two volumes represent the well-intentioned attempt of a jurist to determine war responsibility upon the basis of definitely limited evidence. As an earnest effort to evaluate available materials, his study is worthy of commendation; as a comprehensive and exhaustive interpretation of the existing literature on the outbreak of the World War, it is entirely inadequate.

CHARLES C. TANSILL.

China, An Analysis. By Frank J. Goodnow. Baltimore: The Johns Hopkins Press, 1926. pp. viii, 279.

This is a very readable and suggestive volume by the President of the Johns Hopkins University, who was for a time adviser to President Yuan Shih-kai. The chapter titles give a running summary of the contents: Physical Characteristics and Origins, Economic China, Intellectual China, Philosophical China, Social China, Political China, Modern China, Future China. With the exception of the fourth chapter, which appeared in The Chinese Students' Monthly, the chapters are based on Dr. Goodnow's Lowell Institute lectures in 1917. This accounts for the broad sweep of the brush in portraying China, rather than the minute detail which might have been lavished on each topic. This analysis is, however, a well reasoned study, based upon a unique experience in China, wide reading, and many years of reflection, for Dr. Goodnow returned from Peking twelve years ago. The frequent references to conditions in Europe which, in the past, presented many similarities to present day China, are full of suggestion.

To generalize about a country as vast as China is a difficult, and at times a dangerous, practice. Dr. Goodnow has been compelled to take this chance, with, on the whole, striking success. But there is scarcely a generalization which may be made which does not at once call up exceptions which may weaken if not destroy it. Dr. Goodnow accepts the prevalent opinion that the Chinese are a pacifist people, yet a study of their history offers abundant evidence of the constant recurrence of civil strife as well as, in the past, wars of conquest. And their reputation for religious tolerance has been questioned in the weighty monograph of the Dutch scholar De Groot. To develop all these exceptions, however, would make a treatise far different from the useful one designed by the author.

PAYSON J. TREAT.

Une Nouvelle Sanction du Droit International. Le Projet Busch avec préface de M. William E. Rappard. By Camille Gorgé. Lausanne [etc.]: Payot & Cie, 1926. pp. 107.

This little volume is one which should be consulted by any serious writer upon the problem of sanctions. It is written by a Swiss who is serving as legal counselor to the Japanese Ministry of Foreign Affairs. His sound legal training has resulted in one of the best analyses of the sanction problem which has been done. He probably overestimates the importance of sanctions and the weakness of Art. 16 of the Covenant of the League of Nations, but there are indications that M. Gorgé would accept the following syllogism: War results only from disputes; full provision being made for pacific settlement of all disputes, resort to war is wrong. Therefore, all law-abiding states will see that such action is an attack upon fundamental international principles. In that condition, sanction would be spontaneous, each state taking its most effective measures to defend its right to live under a state of law.

M. Gorgé, however, views sanction as something legally imposed, rather than developed out of the instincts of human nature. He defines Art. 16 of the Covenant as "a sanction of the first order, but of the second degree" (p. 102). He wishes it supplemented by a sanction "of the first degree," which is the proposal of Judge Busch of Zürich.

Dr. Busch developed his thesis in articles in the *Neue Zürcher Zeitung* of September 22 and 23, 1915, November 5 and 6, 1916, and January 10, 1920. In its final form he also presented it before the Swiss Congress of Industry and Commerce at Bern on January 31, 1920. Originally, he contemplated an international peace trust, which should act as trustee for gold from each adherent state amounting to 20 francs per head of its population, against which peace bank notes should be issued to the contributing state. The notes would circulate internationally, would be the normal medium for balancing all exchange operations, and would pass as national currency. Any state found faithless to its engagements, or an aggressor in war, by the Permanent Court (originally of Arbitration, latterly of International Justice) would forfeit its deposit to the injured state, with the ensuing disastrous effect upon its currency. Dr. Busch's later presentation of his plan contemplated an international bank of issue or central bank of the League of Nations as a depository of the gold fund, which would also be used as the basis for a wider range of financial operations, such as bills of exchange, guaranteed treasury bonds, etc. There would also be an international clearing house.

In its last form the Busch proposal is not only well-known in its essentials in international financial plans, but has been much better stated. Economists such as Luzzatti, Cassel, Ter Meulen and Gide have worked on the subject, and it seems to be generally true that financial leaders agree with the idea, but do not know how to realize it. It seems, however, to be reasonably certain that states will not consent to such a scheme primarily as a sanction.

It is more probable that an international bank of issue or even an international clearing house would be organized solely for financial reasons, and in addition to national banking and financial systems. On the scale of contribution suggested by Dr. Busch, his central bank would hold a gold fund of 7 or 8 billion dollars, substantially the world's supply. When one realizes that the United States with a surplus of gold has under practical conditions been unable to loan any of its surplus metal to states lacking gold cover, it can be seen that fiscal administrations would not be likely to let essential gold supplies go out of their own hands.

The project phase of M. Gorgé's book represents one of the aberrations to which international publicists are curiously subject. If and when the economists and financiers produce international financial organs they will inevitably afford additional hostages to international good faith, including the field called political. The generality which might be deduced from M. Gorgé's book is that new developments of financial interdependence would increase the danger to states in either starting war or defaulting their engagements.

DENYS P. MYERS.

¿Es la Guerra Susceptible de Represión? By Gustavo Gutiérrez y Sánchez Habana: Imprenta "El Siglo XX," 1925. pp. 95. Index.

Is war susceptible of repression? The author does not inquire whether war can be abolished, for he believes that as a "natural phenomenon" it will persist in spite of all man can do. He addresses himself rather to a consideration of its control, which he believes can be accomplished to such an extent that the settlement of disputes between nations by an appeal to arms will become the rare exception in international life, just as the adjustment of differences between individuals by armed conflict is already the exception in national life. This result will be achieved, the author is convinced, by the juridical organization of the world; but not quickly or without difficulty because of the inertia of humankind. The tendency is to believe that what has been will be, and in this sense history and jurisprudence serve as brakes on progress. But fortunately from time to time men (geniuses) appear who, not being bound by traditions, can conceive of a future different from the past; and at times great events (revolutions) change the course of history. The author does not despair, therefore, of a future in which war will be nearly, if not quite, abolished.

Dr. Gutiérrez y Sánchez, who is a professor of international law in the University of Habana, has written a thoughtful essay on a subject of perennial interest, and it is pleasant to note that this is the first of a number of monographic studies which he will publish from time to time on international organization. He intends later to revise and republish the complete series as a single work under the general title of *La Liga de las Naciones.*

JOSEPH B. LOCKEY.

The Danish Sound Dues and the Command of the Baltic. By Charles E. Hill. Durham, N. C.: Duke University Press, 1926. pp. ix, 305. $4.00.

Considering this book from the viewpoint from which the author undertook his useful and time-consuming labor, there is ample reason to feel grateful, and there is reason for old Europe to feel a little confused that the unraveling of this typically old-European knot should have been left to the energy of an American scholar. Not only has the author carefully traced the origin of the dues and found them to have started under Erik the Eighth, King of Pomerania and the three Scandinavian countries, in 1430 (Secretary of State Buchanan ascribed them to "a remote and barbarous age," and most authors surmised their origin as far back as about 1200), but he has searched and ransacked Danish archives, library manuscripts and original sources for his investigations on the entire history of the dues up to their cancellation in 1857. He acted rightly in underscoring that, until 1816, the dues were an asset not of the public treasury but of the royal income (pp. 14, 54, 74); a fact which clarifies Denmark's legal argument on the subject. The book has not become an interesting picture, it being difficult to see the wood for trees, and the problem has not been given a background; but its full statement, which as to facts seems mostly accurate, is of real value. The narrative moves freely only after the appearance of the clever woman Sigbrit (pp. 44–47), and gets a new incentive from the period of Christian the Fourth (pp. 77–154). The three pen-drawn maps in the text are helpful to explain the situation.

Considered, however, from the viewpoint of international law and its history, the book merely gives the material, not a result. What international law stands greatly in need of, is neither a history of diplomatic events, nor a genealogy of academic teachings and writings, but a well-connected set of monographs on how in former and later centuries governments thought and wrote and acted as to specific problems of international law. Was levying these dues based on any right, as the kings of Denmark pretended, or merely on force and illegal custom, as was alleged by the Hanseatic towns in 1434, by the Netherland negotiator Boreel in 1641, by Secretary Marcy in 1855 (pp. vii, 13–14, 128–130, 237), and what were the reasons given? How far were the Sound dues in keeping with the other dues, such as those in the Adriatic or on the Scheldt; how far with the freedom of international rivers accepted since 1815; how far were governments consistent in their views (pp. 14, 222)? The notable alternative pointed out on p. 54, placing monopoly on the one hand and piracy on the other, shows how far international legal opinion has shifted since the early sixteenth century.

The embryonic first league to enforce peace which the author thinks he has discovered in the Hague concert of 1659 (pp. vii, 175) was not the first one; the peace treaties of Westphalia of October 24, 1648, give an older and perhaps more remarkable instance (Du Mont, VI, 1728, partie première, pp. 459 and 488). The misinformation on p. 87 on the writings of Grotius and

the life of Selden is to be regretted. French and Danish words in the book are usually correct, but other non-English languages have been less fortunate.

C. VAN VOLLENHOVEN.

La Solution Pacifique des Litiges Internationaux avant et depuis la Société des Nations. By Olof Hoijer. Paris: Editions Spes, 1925. pp. xii, 570. Fr. 50.

Dr. Hoijer's title draws attention to the fact that the introduction of the League of Nations into practical world politics may be regarded as an important division line in pacific settlement methods. In an interesting introduction he calls attention to the changing conditions in nations, and the need for rules of international law to regulate conflicting interests, a necessary part of modern interstate relations. The Austinian conception of international law as ethics rather than law is controverted by an insistence that public opinion, general assent, reënforced by custom and education, furnish the effective authority for international law. The absence of a supra-national tribunal to apply international law does not mean that there is no such law. The continuity of the life of a state makes it possible for the righteous to enlist public opinion on its side, while the wrongdoer can never escape the shadow of its misdeeds.

Chapters I, II, and III deal with direct diplomatic negotiations, good offices, and mediation. Chapter IV is devoted to commissions of inquiry. Chapter V contains an excellent treatment of arbitration. Here the author discusses the field for arbitration, the choice of arbitrators, arbitration by diplomats, by jurisconsults, by mixed commissions and by arbitration tribunals. About thirty-five pages are devoted to an extended discussion of the Alabama Claims Arbitration, called the most celebrated example.

In Chapter VI, the author addresses himself to the pacific settlement methods of the League. He first discusses indirect methods, such as pacifying minorities, disarmament, revision of treaties, development of international solidarity. He denies that the League is a super-state (*super-etat*), but states (p. 309), that the creation of the League implies a protest against international anarchy of sovereign states. The ideal aim of the League is to place force, a material thing, at the service of law, a spiritual thing. The moratorium contemplated in Article 12 of the Covenant is a guarantee against hasty action and gives public opinion time to operate. A full discussion occurs of the Council and Assembly functions in reports on disputes under Article 15. Considerable importance is attached to Article 16 of the Covenant. Experience has pointed out that honor and morality are not enough to protect international engagements; guaranties more platonic and binding are necessary. Special attention is directed to the Covenant's provisions for the settlement of disputes affecting states not members of the League. The relation of the Permanent Court of Arbitration to the Perma-

nant Court of International Justice is discussed. Of the latter the author remarks that it constitutes certain, though modest, progress; it is calculated to be a very useful influence in the evolution of international law. A plea is made for the backing of the court by men of state and by general public opinion. The discussion is closed with the subject of the Geneva Protocol, to which 23 pages are devoted.

In conclusion Dr. Hoijer makes an appeal for the League as an agency of peaceful settlement. Its success to date is due largely to the fact that it was a reality in the minds and hearts of the people before it became an international fact in 1919. The thing necessary to make justice reign is a dominating and vigilant public conscience (*une conscience publique dominante et vigilante*). The church may do much to aid in the development of such a public conscience.

The work is an important contribution to the literature on peaceful settlement.

J. EUGENE HARLEY.

Die privaten Rechte und Interessen im Friedensvertrag. By Hermann Isay. 3d ed. Berlin: Vahlen, 1923. pp. xviii, 488. Index.

In this work the author has analyzed and brought together for exhaustive commentary those provisions of the Treaty of Versailles which more particularly affect private individuals, notably Parts VIII and X of the treaty, the reparation and economic clauses. He has supplemented the examination of this material by the provisions of municipal law of the several belligerent states carrying these treaty provisions into effect, and has rounded out the whole with an examination of the decisions of the Mixed Arbitral Tribunals and related tribunals and commissions interpreting the several relevant clauses of the treaty, together with the professional and technical literature on the subject. While covering to some extent the ground surveyed by Simonton, Scobell Armstrong, and Gidel and Barrault, Isay's volume is more exhaustive and complete than any of those works. The author is mainly concerned with such subjects as nationality, enemy character, the sequestration, liquidation and confiscation of enemy property during the war and under Article 297, the reparation and private claims against Germany, the interpretation of clauses and terms under Article 296 (the clearing house provisions) of the treaty, the questions of "debts" and other claims, cash assets, valorization, the effect of the war and the peace treaties on contracts of various kinds, the relation between creditor and debtor in the various countries and the effect on this relation of the treaty and of the provisions of municipal law carrying the treaty into effect, the "clearing" procedure both internationally and municipally, the status of patents, copyrights and trademarks before and during the war and under the treaties, the effect and execution of judgments during this period, the history of and procedure before the Mixed Arbitral Tribunals, the legal position of Germans and others in the

territories detached by virtue of the treaty, both as to person and property, and the position of neutrals. This survey of subjects treated suffices to indicate the interest which international lawyers must have in the work. The author has apparently accomplished his task in a highly competent and scholarly manner. The volume will indicate to the student how deeply the war and the treaty have exerted their effects on the private individual. It should cause some concern to those who had been taught that private property on land is inviolable.

E. M. B.

Die Gleichheit vor dem Gesetz. Eine Studie auf rechtsvergleichender und rechtsphilosophischer Grundlage. By Gerhard Leibholz. Berlin: Otto Liebmann, 1925. pp. 161. Index. 5.50 Mk.

This is the sixth in a series of *Offentlich-rechtliche Abhandlungen*, edited by Professors Triepel, E. Kaufmann, and Smend. It is a study of the conception of equality in the theory and practice of national law, the equality of states in international law receiving only brief collateral mention (p. 140). Dr. Leibholz is concerned primarily with the problem of equality before the law under the present German Constitution (Art. 109). "Ihn klarzustellen, ist vor allem Aufgabe dieses Buches" (p. 7). But he has written more than an essay on German constitutional law. After an introductory part, dealing in general with the conception of equality in modern democracies (pp. 13–29), the author devotes the principal portion of his work to the principle of the equality of individuals before the law (pp. 30–132), concluding with a third part concerned more briefly with the question of the equality of member commonwealths in the constitutional law of federal states (pp. 133–158). While German practice and theory hold the central place in the monograph, the study is in a measure comparative and rather generously theoretical. Within the limits set, the author has achieved a valuable contribution of which future students of this interesting problem will need to take serious account.

Edwin D. Dickinson.

Histoire Diplomatique de la Grèce de 1821 à nos jours. By Edouard Driault and Michel Lhéritier. Paris: Les Presses Universitaires de France, 1926. Vol. IV, pp. xvi, 579. Fr. 30.

The fourth volume of this important study of the diplomatic history of Greece, which is the exclusive work of M. Lhéritier, deals with the political events connected with the execution of the provision of the Treaty of Berlin (Art. 24) of 1878 by which the Congress bearing the name of that city made certain territorial changes in Turkey in favor of Greece. As the Ottoman Government, as the author tells us, had at that time nullified this decision of the European Areopagus by resorting to tergiversations and delays, the Powers, after exchanging various notes and counter-notes, held a conference

in Berlin in 1880 which, by Protocol 13, traced the frontiers which were to run between Greece and Turkey. According to this decision, two provinces in European Turkey, namely, Thessaly and Epirus, were to be annexed to the Hellenic Kingdom. But as no provision was made for the forcible execution of this award, it remained a dead letter, due principally, as the writer points out, to the conflicting interests of the Powers in the Near East. In view, therefore, of these difficulties, and of the inability of Greece to enforce the execution of the award, she was obliged to accept a compromise settlement which in after years resulted in useless bloodshed.

A special chapter deals with the events of the *coup d'état* of the late Alexander of Battenberg, then Prince of Bulgaria, when in 1885 he seized suddenly Eastern Rumelia, which resulted in the Serbo-Bulgarian War and the pacific blockade of the coasts of Greece.

M. Lhéritier describes in detail the diplomatic negotiations and intrigues connected with the Cretan question during the revolution of the islanders in 1896. After narrating the events leading to the Greco-Turkish War of 1897, as a consequence of the upheavals and massacres in Crete, when, to use the picturesque language of Prince Bülow, Germany retired with her flute from the European concert, the author treats the Macedonian question and gives a summary of the negotiations which were conducted between the various European chancelleries for some years. As is known, this thorny question, the nightmare of the diplomacy of Europe, was disposed of first by the Balkan Wars of 1912–1913 and again after the World War when some readjustment was made in favor of Serbia and Greece against Bulgaria. M. Lhéritier in his research work has undoubtedly exhausted all the available sources of information upon the subject, most of the data being drawn from official documents lying in the archives of the interested Powers. It is certainly a study as complete as it can possibly be.

THEODORE P. ION.

Diplomatic Episodes. By William Carey Morey, with an introduction by David Jayne Hill. New York: Longmans, Green and Co., 1926. pp. xvii, 295. $2.00.

Before his death, two years ago, Professor Morey had collected for publication the papers here presented. He had used the subject-matter for supplementary reading and information in his classes at the University of Rochester. Used in this way, the chapters will prove valuable to students of international relations the country over. His object is well stated in the preface: "These episodes have been discussed to point out the salient points at issue in each controversy, to show the mode in which diplomatic methods may be used in the interests of peace, and to suggest the way in which international diplomacy has extended to the development of certain phases of international law."

Each chapter deals in an elementary and concise manner with some episode or problem in diplomacy, such as the differences between the United States and Great Britain that led up to the Jay Treaty. The case of McLeod in relation to the Federal Government and the State authorities of New York is exceptionally well developed. The American policy of recognition down to the Spanish-American War is summarized. The threatened partition of China in 1900 is sketched. And the international status of the Suez Canal is described.

To the method of acquiring the right of way for a canal across Panama by the United States the author applies in an amusing manner quotations from Grotius and Vattel. The fact that seventeen nations recognized the independence of Panama within a month after its declaration is taken to be adequate approval of the course taken by the United States.

The sale of munitions in relation to the law of neutrality receives a brief discussion. British colonial reforms, especially the influence of the Boer War upon them, furnish the substance for a chapter. Another deals with intervention under the concert of Europe. The last chapter is devoted to an outline of the historical development of the peace movement.

The treatment of the ten large subjects is marked by sanity and open-mindedness. There is no pretence at exhaustive research. But sufficient facts are given to substantiate the conclusions. Withal there is a candor, a sense of proportion, a clarity of expression and an optimism that make the book pleasant reading.

CHARLES E. HILL.

La Clausula de la Nacion mas Favorecida. By Enrique Olaya Herrera. Washington: 1926. pp. 161.

This work is divided into ten chapters, dealing respectively with international economic relations, commercial policy, treaties of commerce, the most-favored-nation clause, objections to and defense of the clause, European policy in relation to the clause, the policy of the United States with regard to the clause, the clause in Latin America, commercial reciprocity and the Pan American Conferences, and the future of the clause.

The author traces the most-favored treatment of nations from its beginning in the agreements made between Italian cities at the end of the twelfth century, its appearance in the treaties of the fifteenth century between France and Turkey, when it was known as the reciprocity clause, and its subsequent appearance in European treaties and those of the United States. According to the European theory, the most-favored-nation treatment was unconditional, while according to the American it implied specific reciprocities; but subsequent to the World War the United States has entirely changed its policy by abandoning the limited conditional formula, and adopting the principle of unconditional treaties, which the American Gov-

ernment has begun to develop with great vigor through exchanges of notes with various Central and South American Governments, as well as with those of Europe.

In discussing the clause in the countries of Latin-America, the author points out that their policy has not always been uniform. The following characteristics appear in their various commercial conventions, (a) treaties with the reciprocal and unconditional clause of the most-favored-nation inserted with more frequency in the agreements with the European nations, (b) treaties with the reciprocal and conditional clause adopted in those celebrated with the United States of America and in some other conventions, but in fewer cases, (c) treaties with the general clause of the most-favored-nation, but excepting favors, extensions or immunities which may be conceded or can be conceded to the products of the Latin-American countries, (d) treaties which concede favors and special extensions to the commerce of frontier countries. A number of concrete examples are given from the commercial treaties celebrated by the Latin-American Republics, illustrating this classification, and showing the circumstances which have given rise to them.

In discussing commercial reciprocity and the Pan-American Conferences, the author states that the establishment of continental agreements concerning commercial reciprocity is shown in the steps which, beginning in 1882, the United States has taken with relation to the Latin American nations of this hemisphere. A brief résumé is made of them.

In regard to the future of the clause, the author believes the new policy of the United States has removed the strongest supporter of the principle of conditional treatment, and that with such change has come a solution of that important topic of international commercial policy. Great Britain is maintaining her secular attitude on the question. Germany has reaffirmed the principle in its last treaty of friendship, commerce and navigation with the United States. The agreements of the Department of State in Washington, by means of notes, cover European industrial countries and agricultural countries of the tropical zone. They embrace the different classes of production and are so numerous and important that the nations which prefer a different policy will be unable to safeguard their economic interests. He adds it is possible some states may adopt along with the clause the customs system of double tariff, inasmuch as that would not be incompatible, but still the principle would always remain dominating in its fullest form.

The author has made a careful and thorough study of the subject, which he has presented in a clear and interesting manner. The book is well written, shows scholarly research, and is a most valuable and opportune contribution to the subject.

WALTER SCOTT PENFIELD.

La Criminalité Collective des États et le Droit Penal de L'Avenir. By Vespasien V. Pella. Bucharest: Imprimerie de l'Etat, 1925. pp. 360.

The author of this monograph, a distinguished Rumanian publicist, professor of penal law in the University of Jassy, and member of the Council of the Interparliamentary Union, sets forth in a preface what, toward the close of the year 1919, at a lecture given before the Law School at Paris, he developed, namely a general plan of International Penal Law, the central idea of which was that aggressive war is a crime. Since then there has been developed the well-known thesis of the "outlawry of war," and the equally well-known attempts in the Shotwell Plan and in the Geneva Protocol to give to the term "aggressive war" the precision of a juristic conception. Largely through the efforts of M. Pella, the Interparliamentary Union created a permanent committee charged with the study of the criminality of war. The present monograph is the result of this determination and was presented to the Interparliamentary Union at its Washington meeting in 1925. An appendix gives in French, English and German, the draft of certain fundamental principles of an international legal code for the repression of international crimes.

The author's opening declaration that aggressive war is a crime is frankly a rhetorical paraphrase of the idea that aggressive war is morally reprehensible and should be made a crime in the legal sense by international agreement. The draft *projet* does not define aggressive war, the first of a list of state offenses in which there are eleven: violation of demilitarized zones, nonsubmission of disputes to the World Court where it has compulsory jurisdiction, mobilization during a dispute, allowing raids to be organized within one state against another state, assistance to factions aiming at revolution in another state, threats of aggressive war, arming beyond treaty-limits, extraordinary military preparations, violations of diplomatic immunities, and counterfeiting the securities of another state. M. Pella would have states, *quâ* states, punished for such actions, according to a list of sanctions, the last of which is resort to armed force. But in addition to the criminality of states, he would make those individuals who actually perform the acts to be made criminal liable to criminal sanctions, *e.g.*, the declaration of an aggressive war by a sovereign, the abuse by a diplomat of his privileges in flagrant contradiction to the fundamental principles of international public order, violations of the law of war (including offenses by armies in occupied territory), and the dissemination of false news liable to endanger peace. It is evident that such conceptions are utopian, but that does not necessarily condemn them. The more discussion aroused the better. The author sets forth these principles as underlying the international law of the future. He has studied the matter conscientiously and has put his ideas in systematic form with considerable documentation. To say that such ideas may be magnificent, but not law, will be to some a condemnation, to others the highest praise. Nevertheless, if the reviewer were to

classify the book, he would be forced to put it, with other quasi-legal efforts, in the section of utopistic literature.

J. S. REEVES.

Lord Aberdeen, Texas y California. Colección de documentos precedida de una introducción por Antonio de la Peña y Reyes. Mexico: Publicaciones de la Secretaría de Relaciones Exteriores, 1925. pp. xxii, 72.

The interest attached to this set of despatches from and instructions to the Mexican Minister at London lies in the description of the British policy regarding the annexation of Texas as seen through the eyes of the Mexican official nearest to it. The period covered by the collection is that between December, 1844, and the middle of 1846.

Though the emphasis shifted in the course of the negotiations from the attempt to prevent the annexation of Texas to the problem of the defense of California, Lord Aberdeen's desire to thwart further expansion of the United States remained a constant factor. This found expression at first in an effort to obtain the recognition by Mexico of the independence of Texas, on the theory that such a procedure would remove all desire on the part of the Texans for annexation. The Mexican reply was that this would merely remove the last barrier to annexation and would serve to hasten that which it was designed to prevent. When an intimation of a possible recognition of Texas, futile as it was destined to be through the course of Mexican politics, did finally reach London, the time for its real effectiveness had passed.

Minister Murphy's pleas for British aid in the impending struggle with the United States fell upon sympathetic ears. Much of the correspondence deals with the efforts of Mr. Murphy and Lord Aberdeen to find a plan by which aid might be rendered. As the Mexican Minister viewed the situation, Lord Aberdeen was ready to aid Mexico, but feared France; it was not so much that French aid was desired as that Lord Aberdeen was afraid of what France might do, should Britain become involved in a war on the American continent. The conversations failed to develop the magic formula which Lord Aberdeen sought: either the coöperation of France or a plan by which England might aid Mexico without becoming involved in war with the United States. Murphy stressed the justice and equity of Mexico's cause. Lord Aberdeen readily assented to this, but he was unable to find a tangible British interest which would warrant interference at the risk of a possible war with the United States. All of Mr. Murphy's suggestions directed toward the creation of a British interest in the situation, met with the response that their real purpose was too obvious. For a year and a half the Mexican and British Ministers went over the same ground time and again. The Mexican Minister received the approval of his superiors to the course he was pursuing, but no concrete suggestions of any benefit. Possibly no formula could be found; in any event, none was found. Lord

Aberdeen seems to have become impressed with the idea that he was embarked upon a hopeless task and to have become increasingly cautious as the conversations continued.

In his introduction, the compiler quotes contemporary Mexican presidents, members of cabinets and of Congress, and historians to show how divided was opinion in Mexico on the issue of the best policy to be pursued in regard to Texas, and so enables the reader to appreciate the difficulties confronting the Mexican Government which made impossible any substantial support of its minister in his efforts to enlist British aid.

Some, if not all, of the documents contained in this volume have been made available heretofore to historians writing on this phase of American-Mexican relations.

IRVIN STEWART.

Le trafic des stupéfiants et la Société des Nations. Par J. Joseph Pila. Paris: Recueil Sirey, 1926. pp. 298.

This book is divided into three parts of unequal length. The first part of 50 pages sets forth the chemical nature, the physiological effects and the history of opium, hashish, morphine, heroin and cocaine. The author quotes authorities on all these technical subjects but does not present a detailed study of any one. Nevertheless, this assembling of material from widely scattered sources is not without interest. One wonders whether a study of the reasons for the distinctive drug addictions which have characterized different races might not throw light on the nature of racial differences. It is also of interest to note that "Musulmans, deprived of alcohol by Mahomet, spread opium in the world in the course of their distant invasions" (p. 11), and that dry America leads in the abuse of that most recent as well as most "ravaging" drug, heroin (pp. 43, 45). America does not rank high in the manufacture of heroin, however, though it leads in that of morphine and ranks fourth in that of cocaine. Japan, from whence the author says most of the American heroin is smuggled, makes almost as much as the rest of the world put together (pp. 45, 53).

The second part of the book deals in 30 pages with the Opium Commission of 1909 and the three Hague conferences of 1912, 1913, and 1914. The Convention of 1912, the signature but not complete ratification of which marked the culmination of the pre-war international effort in the narcotic problem, was in the author's opinion "the realization of the English plan—sustained by France and Portugal, whose interests coincided often with those of England—of regulating internationally the world commerce in opium and opiates so that this regulation could not stop or limit in any way the English commerce with China" (p. 78).

This same policy, in the author's opinion, at first inspired the work of the League of Nations (p. 111), which he treats in the third part of the book in 170 pages. However, the progressive work of the commission under the

pressure of public opinion and the activity of the United States, which he thinks was notable for its good intentions rather than for its intelligence (p. 221 *et seq.*), gradually brought the fundamental issue of Asiatic use and production to the front, and, it may be noted, since publication of this book has led to a radical change in Indian policy. This part of the book consists mainly of quotations from the proceedings of the League's Advisory Committee on Opium and the two opium conferences of 1925, the history of which is given in considerable detail. The author agrees with the conferences that control of consumption and production in the East presents enormous practical difficulties, and can not really begin until China is able to control her own house (p. 218 *et seq.*), but he does not consider the problem hopeless, and thinks real progress was made in the conferences of 1925 (pp. 228, 251).

The book is not a definitive study of the narcotic problem, but a readable and informing survey. A six-page bibliography and texts of the 1925 agreements are appended.

QUINCY WRIGHT.

The Foreign Consul: His Juridical Status in the United States. By Julius I. Puente. Chicago: Burdette J. Smith & Co., 1926. pp. xv, 130. Table of cases. Index.

This work, as stated by the author in his preface, is a presentation of the basic principles fixing the juridical status of the foreign consul in the United States. It is the first text of the kind in English, although Professor E. C. Stowell's work, which it cites, contains many of the earlier cases decided by the State and Federal courts. But the present work contains a citation of more recent decisions, and the ample footnotes with decisions of courts and opinions by leading authorities on every point constitute one of the most valuable features of the book. The author is a member of the Chicago Bar and counsel for the Mexican Consul in that city.

The introduction is devoted to a history of the growth of the consular authority. In the course of this review he says "To this day in various non-Christian countries (*e.g.*, Morocco, Persia, Siam, China, and, in a qualified sense, Egypt) the Consul of a Christian Power retains and exercises much of his former civil and criminal competence over his countrymen." This is no longer true as regards Siam and Persia, extraterritoriality having been abolished by treaty in those countries, and with French ascendency over Morocco, whatever jurisdiction is left to foreign consuls will doubtless soon disappear. (See note 43 on page 30 regarding Algiers.)

The author discusses in the five subsequent chapters the subjects of the Consular Organization, The Exequatur, Consular Privileges and Immunities, his Powers and Duties and his Amenability to Local Jurisdiction. Since the work is limited to describing the legal status of foreign consuls in the United

States it does not discuss the exceptional jurisdiction conferred on United States consuls in countries like China where extraterritoriality prevails.[1]

The discussion of the legal effect of the issue and revocation of the exequatur, as determined by decisions of the courts is interesting. The withdrawal of the exequatur subjects the consul, *ipso facto*, to the civil and criminal jurisdiction of the State courts. The privileges and immunities of the consul belong to the government the consul represents and cannot be waived by him in any judicial proceeding. Much of the law governing the privileges and immunities of a consul, as well as that governing his powers and duties, depends upon the treaty or consular convention between the appointing and receiving states, and the statutes of the particular state in which he is stationed. For example, to determine a question affecting the French consul in New York, the treaty between France and the United States on the subject and the laws of the State of New York would have to be consulted. The rights of a consul under international law are frequently modified by treaty. The question of the exemption of a consul and of his property from taxation has an added importance since the war. The distinction between a professional consul, and a consular agent who also engages in business, here becomes important.

The consul's authority in disputes between masters and seamen on merchant vessels of his country is the sole remnant of his former judicial authority, and here it resembles more the function of an arbitrator. The decisions are conflicting as to the jurisdiction to be exercised by admiralty courts and by consuls in such cases. The notarial functions of a consul do not inhere in the consular office, as the author rightly states, but have their origin in the municipal legislation of the state he represents. Among these is the power of administering oaths and taking depositions for the purpose of procuring evidence for the courts and other authorities of the appointing state.

There is a good account of the powers and duties of a consul in extradition cases and some interesting recent decisions are cited under this head. The author mentions the duty of consuls to see that their nationals are accorded justice and to support them in their right to due process of law before the local authorities. Furthermore, under certain State statutes he may represent the interest of non-resident defendants of a deceased alien under the Employer's Liability or Workman's Compensation Act.

There is an interesting discussion in Chapter V of the right of a foreign consul to interpose in the administration of the estate of deceased aliens leaving non-resident heirs or next of kin, and also of the effect of the most-favored-nation clause in treaties upon consular powers and prerogatives. The author argues that, by analogy between the commercial treaty and the

[1] For a discussion of this subject, see the reviewer's article in the April, 1926, number of this JOURNAL (Vol. XX, No. 2).

consular convention, the rule of reciprocity should prevail, particularly with respect to the right to administer estates of deceased nationals.

The book should be of great assistance to lawyers acting as counsel for foreign diplomatic and consular representatives in this country, and to courts handling cases involving the rights of aliens. It should also serve as an excellent text-book for students in international law classes, or in foreign service schools, or for preparing for a consular career.

C. M. BISHOP.

Le Moratorium de la Lettre de Change et Son Traitement en Droit International Privé. By Eric Ramel. Upsala: Almquist & Wiksells, 1925. pp. viii, 306.

The question of moratory legislation and its international effects upon bills of exchange, first brought into prominence in consequence of the French legislation during the Franco-Prussian War, have given rise to an extensive literature. During the World War similar legislation was enacted by all European countries and by the principal South American states as well. The problems to which such legislation gives rise are important both from a practical and theoretical point of view. The subject is of especial interest at the present time in view of the proposed international unification of the law governing bills of exchange, under the auspices of the League of Nations, following up the work of the Hague Conferences of 1910 and 1912. Such unification of the law must of necessity consider the effect of moratory legislation.

The above work is a doctor's dissertation, submitted to the University of Lund, Sweden. The author has carried on his studies in France and Italy, where he had access to and became familiar with the most important literature on the subject. Barring one or two exceptions, however, he has made no use of the periodical literature on this subject. This is especially noticeable with respect to the German material. The theoretical considerations involved in the discussion of the problems raised by moratory legislation are extremely troublesome in view of the general uncertainty in the rules of private international law governing contracts, and nothing of note has been added by the author in this direction. The author has tried to maintain an international point of view, with the result that, as is so often the case, the discussion lacks definiteness and force. As a collection of data regarding the history of moratory legislation and the enactments during the late war, the work is serviceable. That part of the work also which deals with the positive law of the different countries governing the validity of moratory legislation from the standpoint of private international law and the attitude of the theoretical writers with respect to this question is of practical value. Of especial interest is the chapter dealing with the Swedish law.

ERNEST G. LORENZEN.

Les Traités de Paix et les Droits Privés des Neutres. By Georges Sauser-Hall. Lausanne: Payot et Cie., 1924. pp. 326. Fr. 12.

In this critical study, the author, who is professor of international law and comparative law at the University of Neuchatel, takes up a vital, yet hitherto neglected, aspect of the peace treaties, in an endeavor to determine the actual effects of the Paris and Lausanne settlements upon the rights of neutrals. For him the stage has been set both by the war-time legislation of the various belligerents extinguishing or abridging neutral rights, either directly or by indirection (as through the liquidation of enemy property in which neutral nationals had a beneficial interest) and by the stipulations of the peace treaties affecting private rights in general. It is out of a mèlange of diverse and somewhat incoherent practice, quite at variance with many accepted rules of the pre-war period, that the author attempts to derive principles capable of serving not only as guides to the embarrassed neutral but also as objective legal criteria for the student of international law.

The principal repercussions on neutrals of the peace treaty provisions dealing with private rights are those arising from the different aspects of creditor-debtor relations in which neutrals were left as regards the different belligerents, and from the effects of belligerent domicile in withdrawing from neutrals a large degree of the immunities they would have possessed in their states of origin. The vindictive, unilateral and *ex parte* wartime measures of belligerents were naturally non-enforceable in neutral states, but their consensual confirmation, in large part, by the peace treaties, made them objective rules of law, and, as such, cognizable, though not always or necessarily enforceable by neutrals.

In view o this unprecedented situation, the author develops a series of principles whereby to judge the incidence of the treaties upon neutrals. Private rights validly acquired under the treaties should, he believes, receive full neutral recognition. Likewise, neutrals should recognize all changes in private law rights which do not infringe their own treaty rights with the ex-belligerents. However, private law stipulations of the peace treaties are inapplicable in neutral states when they conflict with regulations of a public character or purport to deal with property which, under the ordinary rules of private international law, is really subject to the jurisdiction of the neutral state. The author holds that neutrals domiciled in signatory states and impaired in, or deprived of, their established rights by the treaties, ought not to be so treated; in any event, he argues, their prejudiced status is purely territorial, within the signatory states, and neutral governments may not recognize the force of the treaty stipulations. Finally, liquidation measures or other strictures against the Central Powers, going beyond the stipulations of the peace treaties in severity, are not capable of recognition by neutrals, inasmuch as they are exceptional and unilateral measures, and, as such, have a strictly territorial character. On these basic principles, inductively arrived at from a survey of cases arising under different systems

of public law, hangs all the law of the neutral under the final settlement. As for the prophets, Professor Sauser-Hall is their prototype!

In the ensuing chapters of the work the author attempts the application of these principles, with fine discrimination, to the situations arising under the treaties. He considers in turn the status of neutral private property in the countries of the Central Powers (where it received fairly considerate treatment), then in the Allied countries (where measures were much more vindictive), and finally, in Turkey, where the Lausanne settlement, being a "clean peace," demonstrates "the incontestable superiority of not striking in any way at the rights of neutral nationals." The enlightened practice of the United States toward neutrals connected with enemy firms is particularly commended (p. 52).

Naturally, questions of nationality and domicile bulk large in Professor Sauser-Hall's discussions, as they were so frequently a source of vexation to the neutral, in whatever capacity he found himself related to the war and its legal exactions. The author is probably at his best in this field of polemic controversy, where objectivity and impartiality are particularly needed. Other questions claiming his consideration are those of the annulment of contracts, the status of industrial, literary and artistic property of neutrals, and the arrangements for compensation procedure, from which neutrals were uniformly excluded, as they were also from the Mixed Arbitral Tribunals. To these Professor Sauser-Hall devotes a meticulously clear concluding chapter. All in all, in his opinion, "the treaties of peace preoccupied themselves with avoiding inequalities among belligerents; neutrals, though subject to war legislation, were almost entirely forgotten."

The book is to be commended for its strict objectivity and freedom from bias; the author does not hesitate to condemn, on either side, the belligerent practices marking regressions from previously accepted enlightened standards of international law. Attention might be called to a certain inaccuracy of statement (pp. 143, 181) as regards limitations on federal impairment of the obligations of contract under the American constitutional system. Such misconceptions are, however, quite pardonable in view of the complexities of our federal system, especially when seen from a distance. The work is a valuable, scholarly one; the ensemble is an authoritative and striking testimony to the increasing incidence of war on the private, and even the neutral, individual, and to the failure of the laws of war or the stipulations of the peace treaties to effectively enforce "that respect for private property which remains one of the most powerful factors of civilization."

MALBONE W. GRAHAM, JR.

The United States and France: Some Opinions on International Gratitude. By James Brown Scott. New York: Oxford University Press, American Branch, 1926. pp. lxxii, 175. $2.75.

It is true that the chief impulse behind French intervention during the American Revolution was the French Foreign Office, but as Jusserand points out, such an impulse had to be grounded on public opinion. That French public opinion strongly supported the Americans in their struggle against British oppression is eloquently attested by the career of Lafayette, and by the earnest and effective coöperation of Rochambeau and De Grasse. Toward the end of 1780 American fortunes were at their lowest ebb, and to many the struggle seemed hopeless. "Yet," according to Professor Corwin, "it is an interesting fact that to those Frenchmen who had come into personal touch with the American cause, that cause had never appeared in more appealing light than at this moment of its greatest prostration."

It is therefore peculiarly fitting that in 1926, a year marking the 150th anniversary of the independence of the United States, there should appear some observations upon the aid extended to us in our struggle for political liberty and upon our consequent debt of gratitude. It would be idle to deny the decisive influence of French intervention in the Revolutionary War, and one will seek in vain through the annals of diplomacy for a comparable illustration of continued and unstinted assistance to a distant people struggling to be free. Our debt to France is an enduring one, and in order to explain its basis, Dr. James Brown Scott has wisely selected certain essays and letters which he presents with an admirable introduction. It is an opportune moment for the publication of this volume, since the rather acrimonious discussion which has arisen over the repayment of certain Inter-Allied loans has tended to disrupt that spirit of harmony and good will which has always characterized our relations with the French Republic. It should recall to American minds the story of French assistance in the founding of our republic.

Dr. Scott's little brochure contains not only such fundamental documents as our treaties with France and the contracts for the payment of French loans, but also a pertinent letter of George Sumner to the *Journal des Debats* with reference to the settlement by Americans of the debt to France, and several essays by Jared Sparks upon the rôle of France during the American Revolution. The contributions of Sparks are of special importance. Not only was Sparks one of the ablest of the "Middle Group" of American historians, but he could write with unusual authority on any question of Revolutionary diplomacy. In 1829–30, Sparks brought out his well-known edition of the "Diplomatic Correspondence of the American Revolution" (12 volumes). As a consequence of this monumental labor he was thoroughly familiar with the European background of American foreign policy, and his treatment of this subject will never be wholly superseded.

Dr. Scott is to be congratulated upon the excellent format of this welcome

brochure, and it is to be hoped that it will effectively serve the purpose of its publication—the cultivation of international good will.

JAMES WILLIAMS RIDDLEBERGER.

Aircraft and Commerce in War. By J. M. Spaight. Longmans, Green & Co., Ltd., 1926. pp. viii, 111. Index. $2.25.

Dr. Spaight, who has contributed so much to the elucidation of law for aërial warfare, in this book, frankly written for that purpose, brings home particularly to Great Britain the importance of aircraft in imperial defense. He regards the interruption of commerce as the prime factor in determining the issue in modern warfare, and aircraft as a capital agency in this determination. Aircraft "will be able to do with the enemy's coast-line that which warships have done outside it," but the present rules for maritime warfare "envisage the war of the military decision," not of economic pressure which is becoming increasingly important. Uncertainty in aircraft rules makes other international complications almost inevitable, as Dr. Spaight shows in case of visit and search.

Commerce carried on under agreements between belligerent and neutral is suggested as one way to solve possible difficulties which might arise from routing commerce. "Rationing" may not be a process to which neutrals will willingly submit, and many of the arguments premise the dominance of Great Britain in the contemplated war without considering in all respects the effect upon the British of such agreements with the opposing belligerent.

GEORGE GRAFTON WILSON.

L'Exterritorialité et ses Principales Applications. Par Leo Strisower. Paris: Hachette, 1925.

This little treatise of some fifty-one closely printed pages is a contribution recently made by Professor Strisower to the publications of the *Académie de Droit International.* It is an analysis of the doctrine of exterritoriality as it has been applied to diplomatic agents, chiefs of state, and the armed forces of a nation, the last being taken to include ships of war, and indeed all public vessels. The result is a short, but none the less useful handbook for the student. If there be a single thought that runs through the work, it is that the student must not put too much trust in the fiction of exterritoriality. It must not be overstressed. Sometimes it is an accurate picture of the law, sometimes it is not. Sometimes it goes too far, sometimes not far enough. Often the student will find that the problem has been worked out by the courts quite independently of the idea. Speaking generally, the law was not evolved from the idea, although the idea has assisted greatly in its development.

Dr. Strisower never loses himself in abstractions. He keeps his feet firmly planted on the ground, and jealously confines his work to a discussion of the cases. The rules as laid down by the courts are stated with precision, and

where there has been a divergence of opinion, the leading cases on both sides are carefully analyzed, and where possible, differentiated. Additional authorities are mentioned in the notes, and a full bibliography is appended to guide the reader, should he desire to follow up any particular question.

FRANCIS FISHER KANE.

Grundzüge des Positiven Völkerrechts. Dr. Karl Strupp. Bonn: Ludwig Röhrscheid, 1926. pp. xvi, 280.

This third edition of Dr. Strupp's treatise on international law brings the bibliography and other parts of the book up to date. He shows the bearing of recent international events and negotiation such as the Locarno agreements of 1925, the attempts to codify international law, and the development of organizations and institutions to promote study and understanding of international law. Certain relationships are graphically shown by charts, as in case of protectorates, mandates, extraterritorial jurisdiction, state agents, etc. State succession, plebiscites, rights of minorities and other recent international problems receive consideration. The changing conditions due to readjustment of political influence have been felt in international law, particularly in putting emphasis on aspects of that law which in the nineteenth century had received little attention. Intervention, whether on financial or other grounds, always demands attention. The rights of aliens, extraterritoriality, servitudes, law of the air, rights in the land under the sea, international unions for general purposes such as post or health regulations, reprisals in time of peace, and the like, are among the less settled topics treated.

In the treatment of the law of war the conformity of rules for the air and land seems too close, though the Hague and other conventions are followed in general. In regard to submarines, the unratified convention of the Washington Conference on the Limitation of Armament is scarcely a final authority. As in most recent books, the pages devoted to neutrality are fewer than formerly. An American or English reader would usually expect more cases to be cited as showing continental practice, and particularly recent decisions of courts. The disappearance, or the disregard of the distinction between absolute and conditional contraband, and of other formerly accepted principles, might be discussed advantageously.

GEORGE GRAFTON WILSON.

Survey of International Affairs, 1924. By Arnold J. Toynbee. London: Oxford University Press, 1926. pp. xvi, 528. Index. $8.50.

The annual Survey of International Affairs represents one of the most ambitious of recent attempts to write contemporary history of a strictly scientific character. The majority of these attempts have failed, but the present experiment clearly demonstrates that it can be done. Professor Toynbee has been singularly successful in the selection and marshalling of

most of his facts and in his careful analysis and judgments in respect to the same. Moreover, he has brought to his task a breadth of historical knowledge and political philosophy, both ancient and modern, which enables him to illuminate his narrative with the most suggestive comparisons and discerning political commentaries. The present volume is, in fact, a fine example of English historical scholarship in which for the most part the scientific precision and impartiality of the historian are combined with the comprehensive outlook of the political scientist.

Although the treatment is primarily annalistic in character, as in the earlier volume, the author has seen fit to broaden the scope of his investigations in some fields so as to secure a more adequate perspective of the particular problems in question. His survey of the subject of Security and Disarmament, for example, covers a period of six years from the Treaty of Versailles to the end of the Fifth Assembly of the League. A more extensive review is likewise made of the question of recent immigration and emigration. The topical method of treatment has materially restricted the scope of the year's survey of international affairs and has forced the author to leave some of the most important world movements for future consideration, but this limitation of subject-matter is more than offset by the continuity and thoroughness of the treatment of the four principal topics selected.

The affairs of Europe naturally engage most of the author's attention, but a few pages are found for a discussion of the immigration policy of the United States and some minor boundary settlements in Africa. The chapters dealing with Anglo-French negotiations and the relations of the Allies to Germany are particularly clear and discriminating. The treatment of the Russian situation is much less satisfactory. In default of adequate original sources of information, Mr. Toynbee has been obliged to fall back upon newspaper reports. There is altogether too much "London Times" about it. Much of this information, he frankly admits, is notoriously untrustworthy. In view of this fact it is somewhat disconcerting to the careful reader to be assured that the "author's account contains nothing intrinsically impossible or even improbable." This is certainly a rather novel and romantic criterion of historical method, which it is to be hoped will not be followed in future volumes.

Professor Toynbee writes from the viewpoint of a broad-minded internationalist who realizes that no country can live unto itself alone, and that the future of his own nation is indissolubly bound up with the prosperity and cultural advancement of other states. This is doubtless the reason for his favorable attitude towards the Geneva Protocol, notwithstanding its rather summary rejection by the English and Dominion Governments. His sympathies are manifestly on the side of Germany in its long drawnout controversies with France over the questions of reparations and the Rhineland. It is interesting to observe that Professor Toynbee emphasizes the important part which the League of Nations has played in rehabilitating

the finances of Germany, as well as of Austria and Hungary, and it is to the League in his judgment that Europe must learn to turn for the adjustment of most of its international difficulties.

In addition to the text, the volume contains several excellent maps and a valuable collection of original documents on various phases of international relations.

This work, we may then conclude, will prove indispensable to all students of world politics. It is by all odds the ablest and most scholarly work that has yet appeared in the field of contemporary affairs. The reviewer would venture to suggest, however, that it might be advantageous in future volumes to pay somewhat more attention to the influence of domestic party politics upon the course of international relations.

C. D. ALLIN.

Das öffentlich-rechtliche Schiedsgericht in der Schweizerischen Eidgenossenschaft des 13–15 Jahrhunderts. By Emil Usteri. Zürich: Füssli, 1925. pp. 332. M. 12.

To the names of Moore, Lammasch, Raeder, Tod, Novacovitsch, Merignhac, and numerous others, we must now add that of Usteri among the scholarly and critical commentators on the history of arbitration. Dr. Usteri has selected for research and systematization the records and experience of arbitration of the Swiss towns, cities and cantons during the thirteenth, fourteenth and fifteenth centuries. His source material consists mainly of inter-city agreements, peace and other treaties, charters, legislative and judicial records, briefs, awards, public documents of all kinds, and diplomatic and private correspondence. It is interesting to observe the care with which Switzerland has preserved its historical records and archives, for we are informed that the bulk of this source material has been reprinted in accessible form. The reviewer is, of course, incapable of determining the accuracy with which the sources have been drawn upon, but he does believe that an able and scholarly work has been produced in a field heretofore but barely touched. It necessarily leads to the inference that arbitration in the Middle Ages existed to a wider extent than has been supposed, and that the examination of such collections as the *Monumenta Germaniae Historica* and other medieval public records would disclose much arbitration material. It also lends a wider interest to the arbitral awards themselves which John Bassett Moore will in due course make available.

Dr. Usteri discusses (1) the historical growth of arbitration in public and private law, the several types of arbitration prevailing in the centuries he has particularly studied, the isolated and the institutional arbitration and its relation to other governmental practices, the *compromis* and arbitral clauses in charters and treaties, etc.; (2) the procedure of arbitration, including the selection of arbitrators and umpire, the procedure before the court of arbitration, jurisdictional questions, the parties, the pleadings, costs, the execution

and finality of awards; (3) the insurance of impartiality and the development of suit by an individual against a group, city or canton, the powers of the arbitrators and umpire, the position of private and public parties, etc.; (4) the personality of the arbitrators, their qualifications and training, their public position, their rights and duties; (5) the extension of the jurisdiction of arbitrators and a survey of the questions submitted to arbitration, which include boundary disputes, contract and tort claims of all kinds, procedural questions, issues arising out of conflicting claims to property, etc.; (6) the leading principles in the determination of controversies, the questions of compromise and decision according to law or according to equity, in which the author finds less basis for distinction than is now commonly supposed, and the use of mediation and conciliation, the sources and criteria of decision, etc.; (7) the development of a Swiss federal law arising out of intercity and public arbitration and the difficulties introduced by the conception of sovereignty; and (8) the legal and political effects of arbitration.

The author points out that from the sixteenth to the eighteenth centuries arbitration went into a decline, and he therefore terminates his study with the fifteenth century. The reasons for the decline are probably not hard to surmise. With the development of ruler sovereignty and the absolutistic doctrines of Machiavelli, Bodin and Hobbes, mystically employing such Roman maxims as *princeps legibus solutus est* and the more modern "State above the law," the defenders of popular sovereignty, of the rights of individuals, of the privilege of resistance to illegality, of the legal state, had a hard time. The growth of the national state tended to subordinate law to force and the doctrine of sovereignty gave it a moral basis. Even Grotius and his followers, though they emphasized the subordination of the State to natural law and the law of nations, only slowly impressed the conduct of states. The implications arising out of the concept of sovereignty, an alleged justification for arbitrariness and uncontrollable power, are still the greatest theoretical deterrents to the development of international law as a system. Down to the nineteenth century, they impaired the development of arbitration, and continue to exert a powerful influence against the orderly determination of controversies between states. The analytical school of jurists, who still receive the allegiance of the Anglo-American bench and bar, and who consider international law as a vague system of moral precepts not legally binding on a State, have played their part in the reluctance of the Anglo-American world to yield "sovereign" power to international law. Witness some of the recent decisions of the United States Supreme Court, which either do not discuss the obvious fact that the municipal statute construed violated international law or else consider the latter of minor importance. So long as constitutional theory maintains the professed freedom of the courts from the rules of international law (unless there is no other source of decision), with Executive correction uncertain and often

dependent on considerations other than legal, the orderly processes of the rule of law internationally, including arbitration, are gravely handicapped.

EDWIN M. BORCHARD.

Paths to World Peace. By Bolton C. Waller. London: George Allen & Unwin, Ltd. pp. 224.

This book is in part an expansion of suggestions made in the author's essay which in 1924 was awarded the Filene prize, open to citizens of the British Commonwealth, for plans for the restoration of peace and prosperity in Europe. The book is devoted mainly to a discussion of political methods and international organization with special reference to the improvement of the League of Nations; but the author recognizes and asserts that by no possible means can the League of Nations be made fool-proof. He believes that war must come to an end, not by direct efforts to prevent it, but by the removal of its causes; not by its legal outlawry, but by the building of so harmonious a world that war will have become a needless anachronism. It is obvious that this book will not satisfy those who demand a solution of the problem of universal and perpetual peace here and now. In harmony with his belief, the author maintains that the more fundamental and more important activities of the League are not those which have to do with the settlement of international disputes, but those which promote international coöperation, since they are working for that permanent human well-being and contentment which tend ultimately to remove the causes of war.

H. W. TEMPLE.

The Fundamental Concepts of Public Law. By Westel W. Willoughby. New York: The Macmillan Co., 1924. pp. xviii, 499. Index. $4.00.

This latest work of the dean of American political theorists, the substance of a course of lectures delivered at the University of Calcutta as Tagore Law Professor, is a sort of abridged text-book and case-book combined. It is divided into two parts. Part I deals with the conclusions derived from a consideration of the fundamental concepts used by jurists in discussing the State. Part II examines the decisions of courts to ascertain how and to what extent these fundamental concepts and their logical consequences have been recognized and applied in constitutional and international law. The author expects to publish another volume discussing the ethical right of the State to exist and the moral extent of its authority. Consequently, his attitude toward the subject in the present volume is wholly juristic or formalistic.

So far as Part I is concerned, readers of this JOURNAL will find of greater interest the chapter on "Law and Sovereignty as Envisaged by International Law" and that on "The Concept of the State in International Law." In the former, among other topics the author considers the relationship between international law and municipal law, whether municipal law can create

international law, or *vice versa*, and whether provisions of subsequent treaties supersede existing municipal law to the contrary. These questions are answered in the negative.

Part II contains chapters on territorial jurisdiction, personal jurisdiction (including such questions as double citizenship and statelessness), *de facto* and *de jure* governments, the status of unrecognized governments, extra-territorial jurisdiction, conflict of laws, jurisdiction over property, and the suability of the sovereign. In each of these chapters leading cases of American and English courts are examined and discussed in the light of the fundamental concepts evolved in Part I. The book seems to be thoroughly up-to-date. Even aerial jurisdiction comes in for some consideration.

The genesis of the book as a series of lectures will account in large measure for many of its virtues and its few defects. The author's style is what might be termed discursive or ruminative; he thinks aloud. The two chapters on sovereignty in Part I are particularly good examples of this, although one misses therein some explanation of Duguit's position on the subject. Perhaps the author intends to discuss this, as well as the novel doctrine of Krabbe, which has subsequently been made available to English readers, in his companion volume to appear later. While this "thinking out loud" makes the book more readable than the average scientific treatise or text-book, it naturally at times involves no inconsiderable repetition. There is a good index and a table of cases cited.

The reviewer can perhaps best sum up his opinion of the volume by stating that he has adopted it as a text for one of his classes. He would have preferred the other volume to have made its appearance first, but he trusts that it will not be long before Professor Willoughby in this way completes his masterly treatment of the subject.

HERBERT F. WRIGHT.

BOOK NOTES

Der Wimbledonprozess vor dem Völkerbundsgerichtshof. Dr. Ernst Wolgast, Internationalrechtliche Abhandlungen, 1926.

This suggestive discussion of the Wimbledon case, the first decided before the Permanent Court of International Justice, forms one of the issues of the new *Internationalrechtliche Abhandlungen*, edited by the late Dr. Peter Klein and Dr. Herbert Kraus. It is a comprehensive view of the case, forming a pamphlet of a little more than two hundred pages.

The *Institut für Internationales Recht* at Kiel University, until recently under the direction of Professor Niemeyer, and now headed by Professor Schücking, has just published two valuable monographs. The first, by Professor Niemeyer, *Allgemeines Völkerrecht des Küstenmeers* (40 pp.) considers the problem whether there is any positive rule of law relating to territorial waters, and what rule might be advocated with a view to uni-

formity and codification. The draft code laid before the League of Nations by the Subcommittee of Jurists, under the chairmanship of Professor Schücking, commented on in this JOURNAL (*supra*, p. 101) was received by Professor Niemeyer too late for consideration, though the draft is printed in the appendix. Niemeyer concludes that the three-mile limit is a universally accepted minimum, but not a general rule of international law, because certain states have successfully advanced a broader claim. Whether Niemeyer is correct or not depends upon what is understood by international law, and on that major postulate there is likely to be as much difference as ever. Niemeyer concludes that the right of passage, though its limitations are variously interpreted, is a rule of international law. The author has learnedly summarized and examined the views and conclusions derived from practice, law and expert opinion.

The second monograph (Spiropoulos, J., *Die de facto Regierung im Volkerrecht* (188 pp.) constitutes an important contribution to the difficult subject of *de facto* governments, general and local, and the legal relations arising out of that ephemeral status. The first part of the study deals with recognition, its conditions and the legal effects on the *de facto* and the *de jure* government, if any, and on third states. The second part deals with the relations between the *de facto* and the *de jure* government as a matter of international law, in respect of treaties and public loans, and as a matter of constitutional law, in respect of statutes, decisions and administrative acts. One chapter also deals with the relations between the *de facto* government and third states in respect of diplomatic representation, capacity to institute legal proceedings abroad, jurisdictional immunity as a defendant and as a government, and the effect of public acts in third states, to which subject the Soviet régime has made the most striking, if confusing, contributions to the law. A third part deals with the international responsibility of the state for illegal acts of general and local *de facto* governments, under various circumstances. Though much has been written on *de facto* governments, notably in late years, this is perhaps the first systematic treatise on the subject written from the international legal point of view. Although the references to the literature are fairly complete (Gaudu's work is apparently overlooked), some additional cases in England and the United States might have been dealt with.. The decision of Judge Wheeler in the District Court in Underhill *v.* Hernandez is theoretically sounder than that of the Supreme Court. It is believed that Justice Clarke for the Supreme Court in Oetjen *v.* Central Leather Co. was in error in concluding that ultimate recognition *de jure*, operating retroactively, served to exempt from judicial review in the United States the validity of the acts of Carranza; the correct ground was rather the mere fact that he was at the time the head of the *de facto* government in Mexico. The author would have been aided by the pamphlet of Mr. Osmond K. Fraenkel, A Digest of Cases on International Law relating to Recognition of Governments (1925).

The third volume in the series published by the Institute for International Law at Kiel consists of a study on the constitution and functions of the League of Nations and its numerous related organizations (*Der Völkerbund, Verfassung und Funktion*) by Doctors Niemeyer, Rühland and Spiropoulos. (pp. 115+79.) It is well done and within limited space presents an informative survey of the history of the Covenant and of the activities of the League. It is supplemented by the more important of the drafts, documents and reports which led up to the final draft of the Covenant.

E. M. B.

Ostrecht. Monatschrift für das Recht der osteuropäischen Staaten. Berlin: Carl Heymann.

This is a new monthly periodical devoted to the law of Eastern European countries. It embraces the law of the Baltic States, Poland and Russia, as well as Hungary and the nations of the Balkans. It is edited by Dr. H. Freund, Dr. E. Löwenfeld and Dr. U. Rukser, all members of the Berlin bar. It contains special articles, reviews of treaties, statutes and judicial decisions, as well as book reviews. A feature worthy of especial attention is the material supplied from sources beyond the borders of the Eastern countries. Thus the decisions of the Supreme Court and the highest courts of some of the American states are digested where the cases involve the interpretation and effect of the law of Eastern countries, particularly of Soviet Russia. The periodical covers a territorial field which has come to present many new problems because of the many changes in government and legislation since the war.

A. K. K.

The Road to Peace: Interviews with Famous Americans and Europeans. By Herman Bernstein. New York: Frank-Maurice, Inc., 1926. pp. 245.

This is a somewhat disappointing book in that it hardly justifies its title. It contains some interesting and valuable interviews with statesmen and publicists, American and European, who discuss the prospect for peace or war in the future; but a great part of the book records conversations with novelists, dramatists, psychologists and literary critics who give expression to temperamental views which do little to illuminate the road to peace.

Das Haager und das Genfer Kriegsverhütungsrecht. By Dr. Karl Strupp. Mannheim: Bensheimer, 1925. pp. 138. M. 4.50.

The compiler of this little book, a well-known publicist, has brought together in German translation, for academic use, several modern documents which he characterizes as "preventives of war." They include the Hague Convention for the Pacific Settlement of International Disputes, the Covenant of the League of Nations, the Statute of the Permanent Court of Interna-

tional Justice, the unratified Geneva Protocol of 1924 and the accompanying Report of Messrs. Politis and Bénès, and the German-Swedish arbitration and conciliation treaty of 1924. The idea is to be commended.

E. M. B.

Recueil des Sommaires de la Jurisprudence de la Cour Suprême de la République de Chine, 1912–1918. Jean Escarra. Chang-Hai: Imprimerie de la Mission Catholique, 1924. pp. xxii, 258. $3.00.

This is one of the collection of volumes upon the laws and court decisions of the Republic of China. The volume is edited by Professor Escarra of Grenoble. Tables showing the number of cases according to class are suggestive. While the reference in the text to each case is very brief, the foot notes are numerous and valuable. The first part deals with general provisions as to laws, customs, definitions, etc.; the second part with obligations, the object, effect, transfer, etc.; the third part with commercial rights, the general nature, business names, records of transactions, etc. The influence of the working of common law and Roman law principles within the same jurisdiction is marked. There is a helpful bibliography, as well as an introduction showing the development of the Supreme Court of China. Another similar volume is in press.

REVIEW OF CURRENT PERIODICALS

By Charles G. Fenwick

Journal du Droit International, January–February, 1926.

Les développements récents du Droit International Privé en Angleterre, by Hugh H. L. Bellot (pp. 5–18), continues a study begun in an earlier number of the journal and discusses the status of incorporated societies, tracing the steps which have led to the final decision that the legal character of a corporation is to be determined by the place where the persons exercising *de facto* control of the activities of the corporation have their domicil. Numerous cases, particularly those arising during the war, are cited, and in conclusion the author quotes approvingly the suggestion that an international convention be drawn up defining the enemy or neutral character of corporations. *La fraude à la loi en droit international privé*, by Jean Perroud (pp. 19–26) deals with the very interesting question whether a person, finding a particular law hurtful to his business interests, may successfully change his nationality or his domicil so as to be governed by the local law to which he has submitted himself.

Ibid., March–April, 1926. *Le statut des minorités nationales au point de vue du droit international privé*, by René Brunet (pp. 273–299), explains certain technical legal problems which may arise under the minorities treaties and urges that, in place of the political decision now rendered by the Council of the League of Nations and its Committee of Three, disputes upon points of law or of fact should be referred to the decision of the Permanent Court of International Justice.

Ibid., May–June, 1926. *La situation légale des sociétés russes en France*, by B. Trachtenberg (pp. 572–577), deals briefly with the delicate questions raised by the recognition of the Soviet Government and the consequences of the dissolution by that government of Russian corporations which had established themselves in France.

Revue de Droit International, de Sciences Diplomatiques, Politiques et Sociales, January–March, 1926.

The Protection of Private Property, by Hugh H. L. Bellot (pp. 5–15), argues, in summary fashion, that in "civilized states" private property may not be taken without compensation, that such right is part of international law, and that in consequence the Succession States of Central Europe are not entitled to expropriate the great landed estates without indemnifying the owners. R. Erich contributes a brief note on "pacific" measures of coercion, a propos the fourth question submitted to the special committee of jurists appointed to consider the Corfu affair. *La Violencia como causa de*

Nulidad de los Contractos internacionales, by M. Raventos y Noguer (pp. 20–32) discusses (in Spanish) the extent to which the provisions of the Covenant of the League of Nations and of the Locarno agreements have changed the old law which did not regard the duress attending treaties of peace as invalidating the agreement. *De la Responsabilité internationale des Etats en raison de décisions de leurs autorités judiciares*, by A. Otken (pp. 33–42), analyzes three arbitration cases, involving denial of justice by local courts, submitted for decision to the Senate of Hamburg, 1856–1864. *Faits et Informations* (pp. 53–75) contains the usual valuable summary of the activities of the League of Nations.

REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE, 1926, NOS. 1–2.

A propos des trois derniers concordats du Saint-Siège avec la Lettonie, la Bavière et la Pologne, by Robert Ruze (pp. 5–56), takes up a controversy which has engaged French publicists for several years, and after a careful examination of the religious situation in the three states concludes that the system of concordats is the most stable and most definite of the possible forms of relationship between the Papacy and states, having also the advantage of being adaptable to time and circumstances. *Le contrôle des armes et munitions et des matériels de guerre*, by L. Dupriez (pp. 57–85) examines in detail the convention signed at Geneva, June 17, 1925, commenting upon the positions taken by the leading Powers and upon the special zones for which particular provision was made. With respect to the provision that the convention will come into force upon its ratification by fourteen states, the author foresees delay in ratification by the manufacturing states until such time as they have been able by private negotiation to agree upon simultaneous action. *Grotius et les tendences actuelles du droit international*, by Maurice Bourquin (pp. 86–125), takes up the thesis of Van Vollenhoven's pamphlet, *Les Trois Phases du Droit des Gens*, published in 1919, and undertakes to show that the system of international law advocated by Grotius, neglected over a period of three hundred years, is at last in process of being established, although under forms determined by the conditions of this later day. In respect to the foundations of international law, embodying the existence of an international society governed by a law restricting the sovereignty of its members, and in respect to the conception of a law of war in which neutrality should be modified by the necessity of restraining acts of aggression, Grotius showed the way along which the League of Nations is progressing with an acceleration demanded by the newer needs of economic and social intercourse. *Le statut international de Dantzig*, by Robert Redslob (pp. 126–156), contains a searching examination of the exceptional status imposed upon the Free City by the Treaty of Versailles and the subsequent action of the great Powers. Dantzig, the author holds, is a state, but a state limited by the dominant sovereignty of the League of Nations. This domi-

nant sovereignty takes the form of a potential control, leaving the actual exercise of power to the Free City. The treaty concluded by the latter with Poland is not the treaty of a protectorate, but one *sui generis*. *La cinquième conférence de droit international privé* (*première partie*), by J. Kosters (pp. 157–201), gives a critical survey of the work of the conference of 1925, discussing in detail, first, the revision of the Hague conventions of 1902 and 1905 dealing respectively with marriage and divorce and with civil procedure, secondly the draft convention relating to succession, testate and intestate, and lastly the execution and the recognition of foreign judgments. *La cour permanente de justice internationale en 1925* (*première partie*), by Michel de la Grotte (pp. 202–230), in addition to taking up the seven cases before the court, makes some pertinent comments upon the ability of the court, as at present organized, to meet the heavier burden of work cast upon it.

REVUE GENÉRALE DE DROIT INTERNATIONAL PUBLIC, January–April, 1926.

Paul Fauchille, by A. de Lapradelle (pp. 5–59), is a sympathetic study of the life and writings of an international publicist well known to American scholars. As joint founder of the *Revue* with Antoine Pillet, and joint editor through a period of more than thirty years, M. Fauchille performed a service which has left an enduring mark upon the science of international law. In addition to numerous briefer works, which are listed at the close of the present article, M. Fauchille published in 1926 the last of his four volume *Traité de droit international public*, the most exhaustive text that has appeared in any language since the World War. *L'Affaire de Mossoul*, by Louis le Fur (pp. 60–103), is a careful and well documented examination of the issue between Great Britain and Turkey culminating in the decision of the Council of the League of Nations on December 16, 1925. *Le principe de la souveraineté de l'Etat et le droit international public*, by Jean Morellet (pp. 104–119), after an examination of existing theory, arrives at the conclusion that "the principle of sovereignty is in opposition to the evolution of the modern world; it keeps the family of nations in a state of anarchy, obstructs the organization of peace, and undermines the very foundations of international law." *La compétence de la Cour permanente de justice internationale en matière de procédure consultative*, by C. G. Ténékidès (pp. 120–129), argues that as between the Council of the League and the Court the interpretation by the Council of the procedure in advisory opinions should take precedence. *La Conference des ministres du travail, tenue à Londres* (*15–19 mars 1926*), by Ernest Mahaim (pp. 130–138), surveys a conference which the author designates as one that "will mark an epoch in the history of the international convention relative to the limitation of the hours of labor. *Etats-Unis de l'Amérique du nord: Leur participation a la Cour permanente de justice internationale*, by J. W. Garner (pp. 139–164), is a careful critique of the significance of the Senate resolution and of the reservations attached to it.

NIEMEYERS ZEITSCHRIFT FÜR INTERNATIONALES RECHT, XXXVI Band, 1 Heft.

Allgemeines Völkerrecht des Küstenmeers, by Th. Niemeyer (pp. 1–40), undertakes to set forth the present status of the problem, with its attendant controversies, as the basis of proposals for codification. Two leading questions are to be determined: Are there at the present day any rules of general international validity regulating coastal waters as a matter of law, and, secondly, what recommendations are to be made with respect to the general international regulation of coastal waters? A number of useful reports of commissions are appended to the article, which itself includes a very careful survey of the historical background of the problem. *Der internationale Schutz der Minderheiten—die Achillesferse des Völkerbundes*, by Baron Heyking (pp. 41–72), discusses the legal and the practical problems involved in the protection of minorities, which the author describes as the "Achilles heel" of the League of Nations. The solution of the problem is found not in the assimilation of minorities in the national majority, but in the coördination of the welfare of the minority with that of the majority, as the result of which citizenship in the state would come to be desired for its own sake and the problem of minorities would solve itself. *Die preussischen Bodensperrgesetze und ihre Auswirkungen auf die ausländischen Grundeigentümer*, by Hans Reupke (pp. 74–89), deals, in a theoretical and constructive way, with the problem created by the Prussian laws passed in pursuance of the new constitution of the Reich regulating the ownership of land and affecting indirectly the rights of aliens. *Die Unklarheit des Begriffes "Internationalisierung von Strömen,"* by R. Hennig (pp. 100–116), deals with the general problem of internationalization with special reference to the relations of the Danube Commission to the riparian states.

Ibid., XXXVI Band, 2–5 Heft. *Die Theorie von den Subjecten und Mitgliedern der Völkerrechtsordnung und die Internationale Arbeitsorganization*, by L. Hamburger (pp. 117–195), is a searching and carefully documented study, first of the distinction between "subjects" of international law and "members" of the international community and of the several legal entities to be classified under each head, and secondly of the legal status of the International Labor Organization and of its dual rôle as "subject" and "member." In the first part of his study the author takes up the traditional theory of international law, shows its dogmatic character and its inapplicability to modern conditions, and suggests the need of converting the old academic classifications into a scientific legal system into which the general categories of law can be fitted. The second half of the article contains a valuable critical analysis of the Labor Organization.

ZEITSCHRIFT FÜR VÖLKERRECHT, XIII Band, Heft 2.

Die Bedeutung des Art. 4 der Weimarer Reichsverfassung für das nationale Rechtssystem, by G. A. Walz (pp. 165–193), examines the sense in which and the extent to which international law was made "part of the law of the land" by Article 4 of the new German Constitution. The special problem involves the consideration of two general problems: what is the true nature of international law, and does international law apply to states only or also to individual persons? *Kritik des Gebietstheorien*, by Walter Henrich (pp. 194–232), continues a study of theories of state jurisdiction begun in Band XIII, Heft 1. The present instalment criticizes the territorial theory (*Raumtheorie*) which is the dominant theory of international jurisprudence, together with the various forms of the "object theory." *Das Flaggenrecht von Schiffen und Luftfahrzeugen nach Völkerrecht und Landesrecht*, by Rudolf Mueller (pp. 233–273), takes up in succession the various legal problems presented by the nationality of merchant vessels and airships and lays down the fundamental principles of an international "flag law," concluding with a discussion of the right of an inland state to fly a merchant flag. *Betrachtungen über die sogenannte Kriegsschuldfrage im neutralen Auslande*, by N. Japikse (pp. 274–294), deals pertinently with the question of "war guilt," discussing incidentally the function of the historian and surveying critically Germany's diplomatic relations with Great Britain during the generation preceding 1914. Baron von Holstein concludes the issue with a brief but useful note on Sweden's maritime boundary.

Ibid., Heft 3. W. Henrich concludes his criticism of theories of state jurisdiction with a discussion of the "combination theory" of Laband, Schmidt, Piloty and others, which bases jurisdiction upon both territory and object, and of the "competence theory" of Radnitzky, followed in the last year by Kelsen. *Das Flaggenrecht . . .* (pp. 353–397), concludes the study begun in the last issue, dealing with effects of national legislation, proposals for unification of national laws, change of flags, and the misuse of flag by war and merchant vessels. *Le conflit diplomatique entre le Gouvernement de Roumanie et la Commission Européenne du Danube*, by Henri Hajnal (pp. 398–415), traces the historical development of the present controversy, now referred for settlement to the Commission on Communications and Transit of the League of Nations, and reaches the conclusion that in view of the new principle established by the Treaty of Versailles, giving to non-riparian states a representation on the commissions, and in view of the new international commission established by the treaty of July 23, 1921, the controversy has taken on an academic character, since in one way or the other Roumania must submit to international control.

Ibid., Supplement to Band XIII. *Beiträge zur Reform und Kodifikation des völkerrechtlichen Immunitätsrechts*, edited by Karl Strupp (pp. 1–84), contains two separate studies by Friedrich Giese and Karl Strupp, both

dealing with the specific case of Herr A, a member of the personnel of a foreign embassy in Berlin. These are followed by the text of the questionnaire on diplomatic privileges and immunities, adopted by the League of Nations' Committee of Experts for the Progressive Codification of International Law, together with the report of the subcommittee, and by a draft convention and commentary submitted by Karl Strupp to the International Law Association at its meeting at Vienna in 1926.

TWENTY-FIRST ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

THE WILLARD HOTEL, WASHINGTON, D. C., APRIL 28–30, 1927

PROGRAM

Thursday, April 28, 1927, 8.30 o'clock p. m.

Opening address by the HONORABLE CHARLES EVANS HUGHES, *President of the Society.*
Codification of International Law. ALEXANDER PEARCE HIGGINS, *Whewell Professor of International Law, Cambridge University.*
Social gathering of members and guests.

Friday, April 29, 1927, 10 o'clock a. m.

Round table conference on the responsibility of states for damage done in their territories to the person or property of foreigners.
Presiding: EDWIN M. BORCHARD, *Professor of Law, Yale University.*

1. Denial of Justice. Discussion opened by AMOS S. HERSHEY, *Professor of Political Science, Indiana University;* CHARLES PERGLER, *former Minister of Czechoslovakia to Japan.*

2. Confiscation. Discussion opened by PHILIP C. JESSUP, *Lecturer in International Law, Columbia University.*

3. Riots and Civil Disorder. Discussion opened by JAMES W. GARNER, *Professor of Political Science, University of Illinois;* HOBART R. COFFEY, *Law Librarian, University of Michigan;* CLYDE EAGLETON, *New York University.*

Friday, April 29, 1927, 2 o'clock p. m.

Continuation of the round table conference.
Meeting of the Executive Council.

Friday, April 29, 1927, 8.30 o'clock p. m.

Presiding: HONORABLE CHARLES EVANS HUGHES, *President of the Society.*
The termination of unequal treaties. Mr. FRANK E. HINCKLEY, *of the California Bar.*
Discussion opened by ALBERT H. PUTNEY, *Director of the School of the Political Sciences, American University;* RAYMOND L. BUELL, *Harvard University;* CHARLES HODGES, *Assistant Professor of Politics, New York University.*

Saturday, April 30, 1927, 10 o'clock, a. m.

Conclusion of discussions on preceding papers.
Report of the Special Committee on Collaboration with League of Nations Committee for the Progressive Codification of International Law.
Business meeting.
Adjournment of the Society.
Meeting of the Executive Council.

Saturday, April 30, 1927, 7.30 o'clock p. m.

Annual dinner at the Willard Hotel.
Toastmaster: The HONORABLE CHARLES EVANS HUGHES, *President of the Society.*
Guests of Honor:
The HONORABLE VINCENT MASSEY, *Minister of Canada.*
The HONORABLE HENRY L. STIMSON, *former Secretary of War of the United States.*
FREDERIC R. COUDERT, Esq., *of the New York Bar.*

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THE INTERNATIONAL MIXED COURT OF TANGIER

By Manley O. Hudson

Bemis Professor of International Law, Harvard Law School

The inauguration of the Mixed Court of Tangier on June 1, 1925, marked the beginning of a new experiment in international coöperation for the administration of justice. While it is perhaps too early for any definite conclusions to be drawn as to the success and significance of this experiment, enough time may have elapsed for some useful study to be made of it and possibly for some forecast of its future.

Some two hundred square miles of Moroccan territory on the extreme northwest coast of Africa have now been set aside as the Zone of Tangier. Most of the inhabitants in this territory live in the city of Tangier, the geographical importance of which would doubtless have given it a special international position even if there had been no other encroachments by foreign Powers in the Shereefian Empire. If the city has a population of seventy thousand inhabitants, as is usually estimated, about one-fourth of them are nationals of European Powers, which are only too ready to serve what are assumed to be more general political interests by a willingness to go to their protection. Moreover, since an early date the diplomatic representatives accredited to the Shereefian Government have resided at Tangier and this fact has tended to set the city apart from the rest of Morocco as a center of foreign influence. For a half century and more, the diplomatic corps has coöperated in various ways in the government of the city,[1] and this, combined with the system of capitulations which still obtains for certain Powers, easily made the members of the diplomatic corps the effective governors of the foreign population.

The special situation of Tangier was formally recognized in the secret Franco-Spanish Treaty[2] of October 3, 1904, which provided (Art. 9) that Tangier should retain the special character given to it by the presence of the diplomatic corps and its municipal and sanitary institutions. In the General Act of Algeciras[3] of April 7, 1906, important administrative duties were entrusted to the diplomatic corps of Tangier, which added to its influence and prestige. The Treaty of Fez of March 30, 1912, which estab-

[1] See Walter B. Harris, "Tangier and Internationalisation," in the *Journal of the British Institute of International Affairs*, November, 1923.

[2] An excellent collection of treaties relating to Morocco and Tangier has recently been published: Rivière, *Traités, Codes et Lois du Maroc*, published by La Société du Recueil Sirey, Paris, 1924, Vol. I. See also Goulein, *Traité d'Economie et de Legislation Marocaines*, Paris, 1921.

[3] For an English text, see United States Foreign Relations, 1906, pp. 1495–1513; also Supplement to this Journal, Vol. I, pp. 47-78.

lished the French Protectorate in Morocco, provided (Art. 1) that Tangier should retain the special character which had been recognized by it and which would determine its municipal organization. The Franco-Spanish convention of November 27, 1912 (Art. 7) envisaged later action which would define the special régime of Tangier; but a draft statute drawn up in 1913 had not been accepted when the World War began in 1914, and the effort to define the special régime proved abortive.

The anomalous condition of the government of Tangier therefore continued for two decades. Nominally it was controlled by the Shereefian authorities, but in fact they exercised authority only over the native population. The foreigners in the city were responsible to their diplomatic and consular representatives, who through their *Conseil Sanitaire* and the more democratic *Comité d'Hygiène* came to control much of the whole population's civic life. Justice was administered in the various consular courts whenever foreigners were proceeded against, and in other cases in the local Moorish courts which include a special rabbinical tribunal. It was a system of government which made progress difficult if not impossible through the trying years when the war itself was placing heavy burdens on the community, and the change which had been envisaged in 1912 became imperative when conditions elsewhere became more stable.

The convention regarding the organization of the Statute of the Tangier Zone was finally signed at Paris on December 18, 1923, by representatives of France, Great Britain and Spain.[4] The convention may be taken to have come into force, as between the three signatories, with the exchange of ratifications at Paris in May, 1924; but the new régime for the government of the Zone, generally spoken of as the Statute of Tangier, was not brought into force until June 1, 1925, the date set by the Shereefian *dahir* of May 15, 1925. The Statute is sometimes said to be "illegal" in a certain sense, because the convention of December 18, 1923, has not been accepted by all the interested Powers. The various signatories of the General Act of Algeciras may be said to be, or to have been, interested Powers. If they were not properly consulted in advance of the signing of the new convention, and if the provisions of the latter go beyond what may properly be said to be supplementary to the provisions of the Act of Algeciras, opportunity has been given to the Powers represented at Algeciras, or to most of them, to adhere to the convention of December 18, 1923. The latter provided (Art. 56) that it should be "communicated to the Powers signatories of the Act of Algeciras and the three contracting Governments undertake to lend each other mutual support in obtaining the accession of those Powers." As a result, Belgium, the Netherlands, Portugal and Sweden have now acceded to the convention.[5]

[4] See League of Nations Treaty Series, No. 729; British Treaty Series, No. 23 (1924). The reservations made by the Spanish representative at the time of signing were withdrawn on February 7, 1924.

[5] Up to November 1, 1926, Sweden's accession was conditional.

Germany, Austria and Hungary were signatories to the Act of Algeciras, but it may be argued that they have now become disinterested as a result of provisions in the various treaties of peace,[6] which are expressly maintained by the convention of December 18, 1923 (Arts. 8 and 9), and in consequence of which the nationals of those three countries have been excluded from Tangier since the war. The remaining signatories of the Act of Algeciras which have not accepted the new Statute of Tangier are the United States of America, Italy and Russia.[7] As to these Powers, the Statute is not so much illegal as non-operative, and the nationals of these Powers remain outside the new régime.

The new Statute provides (Art. 48) for the establishment of "an international jurisdiction, called the Mixed Court of Tangier, and composed of French, British and Spanish magistrates," who are charged with "the administration of justice to nationals of foreign Powers." This court was designed to "replace the existing consular jurisdictions," and the Statute provides (Art. 13) that as a result of its establishment the capitulations shall be abrogated and this abrogation shall entail the suppression of the system of protection.[8] These broad provisions cannot be based upon any authority delegated to the signatory and adhering Powers, and in spite of them capitulatory Powers and privileges are still claimed and exercised by certain of the non-adhering states. There are but few Russians in Tangier, and the position of the Soviet Government seems uncertain; but the United States still claims the benefit of the capitulations in the whole of Morocco,[9] including the Tangier Zone, and Italy claims such benefit in the Tangier Zone.

The organization of the Mixed Court of Tangier was effected in accordance with the provisions of a Shereefian *dahir* of February 16, 1924, a draft of which had been previously agreed upon at Paris. The members of the court are of two classes, titular members and members *adjoints*. Two titular magistrates are named by *dahir* of his Shereefian Majesty on the presentation of the British Government, one on the presentation of the French Government, and one on the presentation of the Spanish Government. The members *adjoints* must be distinguished residents of Tangier, nationals of Powers signatories to the Act of Algeciras, nominated by the consuls of these

[6] Articles 141, *et seq.*, of the Treaty of Versailles; Articles 96, *et seq.*, of the Treaty of Saint Germain-en-Laye; Articles 80, *et seq.*, of the Treaty of Trianon. Cf., Article 29 of the Peace Treaty of Lausanne, of July 24, 1923.

[7] If the Shereefian Government which had ratified the Act of Algeciras may not be taken to have been represented in drawing up the convention of December 18, 1923—the Treaty of Fez of March 30, 1912, gave France control of the foreign affairs of the Shereefian Empire—then the promulgation of the various *dahirs* for putting the new convention into effect, may be said to have constituted a kind of factual acquiescence in the new convention.

[8] The system of protection of various natives as if they were nationals of foreign Powers was regulated by the Madrid convention of July 3, 1880, but it must have been abused even since that date.

[9] Negotiations in 1916 looking toward the abrogation of the capitulations in the French Zone by the United States proved abortive.

Powers to act as such. The salaries of the titular members are paid by the Tangier administration,[10] but the members *adjoints* serve without salary. Two magistrates, one French and one Spanish, also serve as "*procureurs près le Tribunal Mixte,*" forming a public ministry and acting for administrative purposes as members of the tribunal.

During the first eighteen months, there have been some changes in the court's personnel. For most of the period, only three titular members have been serving. Judge Briscoe and Judge Fitzgerald were first presented by the British Government, but Judge Briscoe was succeeded in November, 1925, by Judge Hume Barne, and Judge Fitzgerald resigned after ten months of service. Judge Diaz-Merry was presented by the Spanish Government in November, 1925;[11] Judge Marion was presented by the French Government and has served since the commencement of the court. The two *procureurs*, M. Rodière (French) and M. Arizcun (Spanish), have also served since June, 1925. Nine members *adjoints* have been presented by each of the British, French and Spanish consulates, but none have been named by the other consulates.

The bar of the court consists of eighteen lawyers, all Europeans. For admission to the bar, one must have the qualifications necessary for admission to the bar in his own country, and only nationals of signatories of the Act of Algeciras are admitted. Although Europeans are admitted to practise in the Mendoubian Courts, Moors are not admitted to practice in the Mixed Court; but in certain cases before the section of the first instance, relating to real estate, the presence of two Mussulman jurisconsults acting in a consultative capacity is required, and for this purpose a list of eight qualified candidates is presented to the court by the Mendoub.

The law to be applied by the court is contained in the seven codes provided for in the convention of December 18, 1923 (Art. 48).[12] These codes were promulgated by the Shereefian *dahir* of January 15, 1925, after having been drawn up by a commission consisting of Judge Gentil, formerly president of the tribunal of Casablanca, Judge Fitzgerald, who later became a titular member of the court of Tangier, and Judge Lacambra, member of the Spanish tribunal at Tetuan. The code respecting the civil status of foreigners in the Tangier Zone follows very closely the codes of the French and Spanish Zones dealing with that subject. The commercial code follows those of Spain and the Spanish Zone. The penal code and the code of criminal procedure follow the French codes. The code of obligations and contracts is largely borrowed from that of the French Zone, but the work-

[10] The annual salary of a titular member was originally 30,000 Moroccan francs, but this amount has been more than doubled, owing to the prevailing high prices.

[11] Judge Lacambra, of the Spanish Court of Tetuan, acted during the period of organization of the Mixed Court.

[12] A collection of the organic codes and texts of the Zone of Tangier was published in French by the Government of the French Protectorate at Rabat in 1925; and in Spanish by the Spanish Government at Madrid in 1925.

men's compensation law annexed to it is borrowed from the Spanish law of January 30, 1900, as modified by the Spanish law of January 10, 1922. The code of civil procedure is along French lines. The code of immatriculation provides a modified Torrens system for the registration of land titles, similar to that previously adopted in Tunisia[13] and in the French protectorate in Morocco.

The Mixed Court has a very extensive jurisdiction, which is difficult to describe in general terms. In the first place, jurisdiction in Tangier is divided between the Mixed Court and the courts of the Mendoub, who is the local representative of the Sultan, and the latter include both the Moorish courts, applying the law of the Koran, and rabbinical courts, applying the law of the Talmud in cases affecting the personal status of Jews. In the second place, while the Mixed Court was designed to "replace the existing consular jurisdictions," its power over foreigners is not complete, nor is it as limited as was the earlier consular jurisdiction. Process still runs against Americans and Italians, at least, only in their own consular courts; but with this limitation it may be said that in general the Mixed Court is competent to deal with cases affecting the nationals and protégés of the Powers which have ratified or adhered to the convention of December 18, 1923, and the nationals of Germany, Austria and Hungary.[14] Though the régime of protection has been suppressed, protégés who were such at the date when the convention (or possibly the new régime) came into force, have been subjected to the jurisdiction of the Mixed Court. All civil and commercial cases to which Europeans are parties, except cases relating to land, other than possessory actions, to which Moors are parties, come within the court's jurisdiction. In criminal matters, the court is competent wherever a European is accused or is an accomplice, or is the victim of an alleged crime; so that in fact many Moors and Jews are prosecuted before the Mixed Court. Power is also given to the court to protect its own process by the aid of criminal prosecution, and to deal with certain cases affecting the administration of the Zone.

The organization of the Mixed Court includes three sections, in addition to the functions of committing magistrate exercised by a titular member as judge of instruction. The section of peace acts as a justice of the peace court, with jurisdiction over petty criminal offences and breaches of local regulations and over civil actions involving amounts not exceeding three thousand francs. It is presided over by a titular judge, who does not have the assistance of a member *adjoint*. The section of first instance carries the larger part of the work of the court. It has a general jurisdiction in civil, domestic, commercial and administrative matters, and extensive jurisdiction over criminal cases of a more important character. In addition it entertains appeals from the section of peace. It is presided over by a titular judge, who

[13] See Rectenwald, "Notes sur le Tribunal Mixte Immobilier de Tunisie," *Revue Algérienne, Tunisienne et Marocaine de Législation et de Jurisprudence*, June–July, 1922–1923.

[14] See, however, Art. 9 of the convention.

is assisted by two members *adjoints*, one or both of whom is generally of the nationality of each of the parties. The members *adjoints* are not consultative merely, but exercise power almost equal to that of the titular judge. The criminal assizes, held three times a year, really fall within the competence of the section of first instance, the titular judge being assisted by a jury of six men chosen from lists of jurors presented by the various consulates. The jurors are usually of the same nationality as the accused, but if the accused is a Moor, the jury is composed of three Moors, an Englishman, a Frenchman and a Spaniard. The requirements for the selection of jurors are cumbersome, and not easily administered. The judge deliberates with the jurors. The section of appeal is composed of three judges, who have not previously had to do with the case, and two members *adjoints*. The attribution of functions among the titular judges is made once a year, each of the judges being assigned to a section. Each of the three sections possesses a large amount of autonomy, which may at times result in lack of perfect coördination.

The judgments are read in open court, but there is as yet no published collection of the opinions. A few of the opinions have been published in the *Receuil de Législation et de Jurisprudence Marocaines*,[15] but none have been included in the *Bulletin Officiel* of the Zone of Tangier.[16] The official languages of the court are French and Spanish. For many purposes it is necessary to use Arabic also, and the population of Tangier is so mixed that the official interpreter must command other languages as well. In some instances, legal notices must be published in French, Spanish and Arabic.

The Mixed Court has had to encounter many difficulties during the first eighteen months of its functioning. It has suffered with other organs of the new international administration from the uncertainty of the political status of Tangier, and from the psychology produced by continual discussion of radical changes in the régime. It has met numerous exigencies which were not foreseen in the paper plan for an institution of which no precise counterpart had previously existed. It has had the delicate task of building prestige and winning confidence with the varied population which it serves, some elements of which may not have been unwilling to herald its failures, and this task has not been rendered easier by too frequent changes in the court's own personnel. It has had to construct *de novo* an administrative organization within the too rigorous framework of the Statute and the *dahirs* which constitute its organic law. It has had to mould fresh codes into a body of law which would meet the needs of every-day judicial action. And in all these conditions, it has lacked the guidance of a jurisprudence and a juris-tradition.

But it does not seem premature to say that the efforts of eighteen months have yielded very satisfactory results. The court has established harmoni-

[15] See No. 81 (January, 1926), p. 21 and No. 83 (May, 1926), p. 67.

[16] Of which eight numbers appeared prior to November 1, 1926.

ous relations with its public, and the judges have worked with harmony among themselves. The prestige and influence of the court have steadily increased as its expeditious despatch of business has come to be known, and its rôle has been accepted not only by the Europeans who live in the Tangier Zone, but also by many of the Moorish inhabitants. The current of opinion among the Europeans would certainly be in the direction of saying that the situation has been improved by the establishment of the new system of administering justice. It might not be difficult to suggest certain changes which would result in further improvement, changes both in the structure of the court and in its methods. Perhaps the power of the members *adjoints* should be more definitely circumscribed; more use might be made of Moorish and even Jewish *adjoints* or jurisconsults; adaptations might be devised which would tend in time to bring a larger part of the population under a single system of law; the different sections of the court might be better coördinated by a reduction of their autonomy; and perhaps the procedure on appeal could be made more satisfactory. These and many other changes could easily be suggested. But it is not a system in which changes can be made easily; no competent international conference sits for the purpose, and no provision has been made for considering a revision of the convention of December 18, 1923, before 1935. Even the *dahirs* which form a large part of the court's constitution cannot be changed without agreement among many different elements. The more immediate need is that the governments concerned should coöperate to produce conditions which will attract competent men to accept posts in the service of the court and to remain in them more or less permanently. So long as the international régime at Tangier continues, the efficient administration of justice will continue to be a responsibility which these governments owe to the natives as well as to the international community.

The experiment is very different from any international administration being attempted elsewhere. Even if it may not throw important light on the more general problems of international coöperation, it will be interesting to watch as long as it continues.

THE APPLICATION OF SOVIET LAWS AND THE EXCEPTION OF PUBLIC ORDER

By Max Habicht, J.U.D., S.J.D.

One of the most controversial rules of private international law is the exception of public order,[1] the rule not to enforce foreign laws which are contrary to the fundamental conceptions of the law of the state having jurisdiction. There is no country in which this exception has not played an important rôle in the refusal to enforce foreign laws, and numerous writers have discussed the importance and difficulties of the exception of public order. Its problems had been thoroughly studied before the World War by many authorities on private international law, among others[2] by Bustamante,[3] Fiore,[4] Kahn,[5] Klein[6] and Pillet,[7] without a uniform solution having been reached. When, after the war, the states began to reëstablish their international relations, the exception of public order began anew to play its rôle in the courts the world over, and to put the same difficulties before the judges dealing with cases of conflict between domestic and foreign laws.

It is mainly in the conflict between the law of Soviet Russia and the laws of the other European jurisdictions that the exception of public order began again to play its part. "It would be vain to dissimulate," says the editorial of the *Journal du Droit International* in March, 1925, "that the arbitrary notion of the international public order becomes the central point in such discussions on the conflict between communistic and non-communistic laws."[8]

The exception of public order has already served in some practical cases to bring about a refusal to enforce modern Russian laws of nationalization and succession.[9] Such a decision is a very delicate one for any state having

[1] In countries of Anglo-Saxon origin, the expression "public order" is not so familiar as the term "public policy." J. H. Beale in his "Treatise on the Conflict of Laws," p. 77, chooses also the expression "public order" in describing the exception, which is preferable in view of the fact that German writers likewise have adopted the expression "*ordre public*," a term created and generally used in the French, Italian and Spanish literature.

[2] See, *infra*, IV, p. 243.

[3] A. S. de Bustamante, *El orden público, Estudio de derecho internacional privado*, Havana, 1893.

[4] Pasquale Fiore, *Sulla limitazione dell'autorità delle leggi straniere*, Napoli, 1907; "De l'ordre public en droit international privé." *Instit. dr. int.*, Paris, 1910, being a report read before the *Institut de Droit International*.

[5] Franz Kahn, "Abhandlungen aus dem internationalen Privatrecht. I. Die Lehre vom ordre public," Jhering's *Jahrbücher*, Vol. 39 (1898), p. 1; and Jena, 1898.

[6] P. Klein, "Abhandlungen aus dem internationalen Privatrecht. III. Die Lehre vom ordre public," *Archiv für bürgl. Recht*, Vol. 29 (1906), p. 311.

[7] A. Pillet, *De l'ordre public en droit international privé*, Grenoble, 1890.

[8] P. 305.

[9] See, *infra*, V, p. 249.

recognized the Union of the Socialist Soviet Republics, and some statements have already been made denying that the exception of public order can be an obstacle to the enforcement of Soviet law abroad.[10] In this way the meaning and the effect of the exception of public order has lately become an important part of the discussion on Soviet Russia's recognition. Has recognition the effect that the legislation of the Soviet Government affecting private rights abroad has to be enforced without any restriction by the recognizing state? If some day the United States should recognize the Soviet régime, the question of how far the exception of public order can be a bar to the recognition of Soviet law in this country would immediately come up in the American courts. It may be useful for such future discussions to review at this moment the entire doctrine of public order, to collect the statutes of the different countries dealing with the exception and to describe the Russian cases in which the exception has already been applied.

The following study tries to present such a review—(I) in showing the general character of the exception; (II) in giving the formulations of the exception of public order in international conventions, codes, and court decisions of various nations; (III) in pointing out how far the exception shows the same aspect in all jurisdictions; (IV) in giving an outline of the different doctrines as to the exception in the countries of Latin, Germanic and Anglo-Saxon origin; and, finally, (V) in showing the application of the rule by courts in modern Russian cases.

I. The Rule as an Exception of Private International Law

Within its own territory, every civilized nation recognizes to a certain extent the effects of foreign laws. The limit of recognition and enforcement of such foreign laws is regulated in every country by the rules of conflict of laws, that is private international law. Although the object of private international law is the same the world over, that is, to regulate the conflicts between domestic and foreign law, its rules are not uniform for all nations. Certain principles, however, are known in all jurisdictions, and one of these universally accepted rules is the exception of public order. What is its place among the rules of private international law? This may best be answered by the following considerations:

All countries admitted in general that foreign laws would be recognized and enforced by their courts within a certain field. Their next task then was to determine this field and to find the limits of recognition and enforcement of such foreign law. It was soon discovered that certain domains of the law could not by their very nature be allowed to suffer any foreign interference, as, for instance, the constitutional law, the penal law, the law of procedure, etc. The recognition of foreign law as equal or superior in such

[10] "It appears a serious breach of international comity if a state is recognized as a sovereign independent state to postulate that its legislation is contrary to the essential principles of justice and morality," says Scrutton, L. J., in Luther *v.* Sagor (1921), 3 K. B. 532.

domains has been generally denied. The recognition of foreign law would be against "the public policy" and would endanger "the public order," it was argued; and hence in some countries it became customary to designate all laws which never could yield to foreign rules as "the laws of public order."

Notable writers[11] in countries of Latin origin tried to enumerate such laws, and they created the French-Italian-Spanish doctrine of public order. In the light of this doctrine the public order seems to have two functions: (1) a general one, that is, to determine the entire field in which foreign law may be recognized;[12] and (2) a special function, that is, to state when, within this free domain where foreign law is generally recognized, such foreign law might exceptionally not be enforced. This latter function is the one in which we are particularly interested for this is the sphere of the "exception of public order."

The public order functioning as an exception is discussed in all jurisdictions, while the other considerations of the French-Italian-Spanish doctrine have not received much attention in countries of Germanic and Anglo-Saxon origin. In these countries general recognition of foreign law is based on other theories, and the public order is invoked exclusively to watch over that generally admitted enforcement of foreign laws, in order to bar it at once whenever "the good government of the territory" might be affected. The exception of public order appears everywhere as the generally adopted rule to prevent inequitable consequences of any theory, which admits the recognition of foreign laws.

The rule represents itself as an exception to all other rules of private international law, an exception which will operate whenever the public order is endangered.

II. The Formulations of the Exception of Public Order

Considering the question, "What does the exception of public order state," it may be useful to give in the very beginning some formulations of the rule as laid down by international conventions, by codes, and by courts.

In Article 4 of the additional protocol of the Congress of Montevideo[13] the rule is formulated as: "The laws of foreign states will never be applied against political institutions, the laws of public order, or against good usages of the place having jurisdiction."

The Civil Code of Italy of the 25th of June, 1865, says in its preliminary part, Article 12: "Notwithstanding the dispositions of the preceding articles, neither the laws, acts or judgments of a foreign country, nor private disposi-

[11] See, *infra*, IV, p. 243.

[12] It was believed that it was possible to divide all laws into two classes: (a) laws of public order, (b) laws which did not appertain to the public order. It was then stated that the second category may yield to foreign laws.

[13] See *Actas y Tratados del celebrados por el Congresso Internacional Sud-Americo de Montevideo. Anexo a la Memoria del Ministerio* (1899), p. 99[2]. *Cf.* Article 54 of the decisions of Lima.

tions or contracts, can in any case derogate from prohibitive laws of the Kingdom concerning persons, property or acts, or from laws which in any way whatever affect public order or good morals."

The Argentine Republic fixed the exception of public order in its Civil Code of 1869, Article 14, as:

> The foreign laws shall not be applicable:
> 1. When their application is contrary to the public or criminal law of the Republic, to the religion of the State, to the tolerance of cults, or to good morals and good customs.
> 2. When their application would be incompatible with the spirit of legislation of this code.
> 3. When they would be mere privileges.
> 4. When the laws of this code, conflicting with foreign laws, would be more favorable to the validity of acts.

The following two articles of the *Code Napoléon* are invoked in France as containing among others the exception of public order:

> Article 3: The police laws and laws regarding public security are binding upon everybody in the territory.
> Article 6: Private contracts cannot derogate from laws which interest public order or good morals.

After very careful studies and a thorough discussion the German legislature formulated the exception of public order in 1896 in the Introductory Act to the Civil Code, Article 30, in the terms: "The application of a foreign law is excluded if the application would contravene good morals, or the purpose of a German law."[14]

The Greek civil law for the publication, consequences and application of laws in general of the 29th of October, 1856, says in Article 8: "In no case can foreign laws be applied by Greek courts if they contravene the domestic laws of public order or concern institutions not recognized by the Greek laws."

In the United States the courts tried to formulate the exception in numerous cases. Parker, C. J., of Massachusetts, in Prentiss *v.* Savage,[15] speaks of "the well-known exception . . . that the laws, which are to be admitted in the tribunals of a country where they are not made, are not to be injurious to the state, or the citizens of the state, where they are so received," and in the New York case of De Brimont *v.* Penniman,[16] Woodruft, J., states that "there is no recognition of foreign judgments when such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens."

An often cited passage about the exception of public order in English courts is the statement of Turner, L. J., in Hope *v.* Hope, speaking of the enforcement of a contract entered into in another country: "If it be in breach,

[14] See also translation of Chung Hui Wang, German Civil Code, London, 1907.
[15] 13 Mass. (1816) 20 *et seq.*
[16] 10 Blatchford's Circuit Court Reports (1873) 436 *et seq.*

fraud or evasion of the law of this country, or contrary to its policy, the courts of this country cannot, as I conceive, be called upon to enforce it."[17]

These examples will suffice here. A detailed list would show over twenty-four formulations of the exception of public order in all different languages.[18] In summarizing the contents of these formulations, one might state with J. H. Beale:[19] "It is in brief, that any regulation of the territorial sovereign for the good government of his territory must be obeyed by a foreigner within the territory, no matter what his personal laws may be."

III. The General Aspect of the Exception of Public Order

The formulations of the exception of public order, we learned above, differ considerably in their contents, and it is a fact that the differences in the conception of the rule are not only to be found between different systems of law but also within one and the same jurisdiction.

In view of these divergences in opinion on the subject, it is preferable to begin its analysis in showing first how far there is uniformity in the interpretation of the exception of public order.

First, it must be stated that the exception is universally applied as a kind of "safety-valve" to the rules of private international law wherever, through the application of foreign law, the public order would be affected. The question of when that public order is affected takes us at once into the field of controversy. The numerous legislations, statutes, court decisions and writers answer the question of when the exception shall become operative, very differently. It is just a colorless term when it is said, "whenever the recognition and enforcement of the foreign law would affect public policy or public order." It is such a vague expression that there was danger that everyone would have his own private conception of the rule.

It seems that the terms have been chosen to cover something which is extremely difficult to explain and to define. All that can be said concerning

[17] D. M. & P. 743.

[18] Besides the mentioned examples, compare also the formulations in: Acts of the Second Hague Conference for the Unification of Private International Law (Article 11); Spanish Code of 1888, Article 11; Congo Free State, Civil Law of the 20th of February, 1891, Article 9; Report by Messrs. Mancini and Asser before the *Institut de Droit International*, Session at Geneva, 1874, in *Revue de Droit International*, 1874, p. 583; Resolutions of the *Institut de Droit International*, Session at Oxford, 1880 (in *Tableau Général de l'Institut de Droit International*, 1873–1898, pp. 34–35). *Cf.*, also, *Annuaire*, 1925, p. 140; Japan, Law concerning the application of laws in general (*Horéi*) of June 21, 1898, Article 30 (see J. E. de Becker, Civil Code of Japan, Vol. II, p. 7); China, Statute of the 5th of August, 1918, on the application of foreign laws, Article 1 (see E. Padoux, *La Lois Chinoise du 5 Août*, 1918, Pekin, 1922); Belgium, Civil Code, Article 3; Bolivia, Civil Code, Article 4; Guatemala, Civil Code, Article 4; Holland, Civil Code, Article 8; Monaco, Civil Code, Article 3; Peru, Civil Code, Article 4; Germany, Interpretation of the exception by the German *Reichsgericht*, *Entscheidungen in Civilsachen*, Vol. 60, pp. 299–300; Antonio Sanchez de Bustamante y Sirven, *Proyecto de Código de Derecho Internacional Privado*, Habana, 1925, Article 8.

[19] *Cf.* A Treatise on the Conflict of Laws, 1916, pp. 77–78.

the uniform application of the exception is that the rule has been constantly called into operation whenever the court has been shocked by some consequences which the enforcement of foreign law would have had in the territory of its jurisdiction, consequences which seemed to offend the general conceptions of morality and public policy of that entity.

The arguments for such application of the exception of public order have always shown much variety and have been manifold. One reason for this is that the sources of international private law are as numerous as independent states and that every sovereign is free to give the exception whatever meaning he likes. Another reason for the divergences is the fact that the exception, difficult to define, has for the most part been formulated by legislatures in a very vague manner. Nearly everything has been left to the discretionary power of the judge, and hence the divergences between courts even of the same jurisdiction. And finally the fact that the exception of public order deals with questions of morality and principles of policy, which appeal to the very personal judgment of the individual, is another reason for the variety of opinions expressed in connection with the exception of public order.

IV. The Divergences in the Theory About the Exception of Public Order

The opinions began to differ as soon as the following question had to be answered: "What makes the exception operative, or, in other words, when is the public policy or the public order affected?"

In countries of Latin origin there was an effort to find a universally satisfactory answer to this question by defining the public order. Attempts were made to establish a list of all elements belonging to the public order of a given state, and then to say that any foreign law not in harmony with such elements could in no way be recognized and enforced. This analysis of the public order soon showed that the term was too large, that many elements of the public order of a country were compulsory only for nationals and were not opposed to the recognition of foreign law for foreigners in the same matters.[20] So Brocher[21] began first to distinguish between an "*ordre public interne*" and an "*ordre public international,*" stating that only the international public order will prohibit the recognition and enforcement of foreign laws. This distinction has been followed by many writers,[22] who have

[20] A. Weiss, *Manuel de droit international privé*, 8th ed., Paris, 1920, pp. 375–6, cites as examples the laws regulating the acquisition of majority. The rule, contained in the French Civil Code, Art. 488, declaring major persons of twenty-one years, is compulsory only as far as French citizens are concerned. In spite of being a rule of the public order of France, it will not apply to foreigners.

[21] Brocher, Ch., *Nouveau traité de droit international privé*, Paris, 1876, pp. 342, 353–4; *Revue de droit international*, XIII, pp. 531 *et seq.*

[22] *Cf.* Heinz Weber, *Die Lehre vom ordre public international*, Thesis, Zürich, 1922, who gives a list and the citation of those writers on page 34, note 61. He cites among others: Weiss, Despagnet, Bustamante, Durand, Laghi, Fiore, Pillet, Rolin, Boissarie.

pursued the definition of the public order further. If the writers of the French-Italian-Spanish school have not all adopted this distinction, they found it necessary, nevertheless, to make another division of the public order. So Despagnet[23] speaks of an "*ordre public absolu*" and an "*ordre public relatif,*" and Valery[24] of an "*ordre public national*" in opposition to the "*ordre public territorial.*" Such distinctions, the consideration of which in detail is not within the scope of this inquiry, show that all these writers agree that *only a part* of the public order prohibits the recognition and enforcement of foreign laws.

The next problem was to determine this part, called by some the "*ordre public international.*" To this question the writers of the French-Italian-Spanish school have given the following answers: Fusinato[25] enumerates as belonging to the international public order those legal precepts which evidently and principally serve to guarantee in the state the political, economical, and moral order established by the legislator, an order which the territorial sovereign through high political, economic, and moral considerations has deemed good to consecrate. Contuzzi[26] mentions those laws, which safeguard directly and immediately the principles upon which is based the political organization of a civil society, and, therefore, safeguard the state as a collective entity; the laws which have for their direct object the interests of third persons and the conservation of the social institutions. Similar is the language of Buzzati,[27] who stresses the fact that these laws are closely connected with the ethical, religious, economic, and political principles of a state. Laurent[28] includes in the international public order those laws "*qui interessent les droit de la société, sa conservation, son perfectionnement.*"[29]

By these formulas the judge was not much helped in any practical case. It was left entirely to him to solve the most difficult aspects of the problem, that is to say: (1) What are the ethical, religious, economic, and political principles of a given state? (2) When does the application of foreign laws affect these principles?

The writers of that school tried thereupon to elucidate the doctrine in drawing up a list of all such principles and laws constituting the international

[23] Despagnet, Fr., *De l'ordre public international*, Clunet, 1885, pp. 5 and 217 *ff.*; Précis, pp. 218, 481.

[24] Valery, J., *Manuel de droit international privé*, p. 574.

[25] Fusinato, Guido, *Questioni di diritto internazionale privado*, pp. 36, 51.

[26] Contuzzi, *La codificazione del diritto internazionale privado*, p. 58.

[27] G. C. Buzzati, *l'Autorità della legge straniere*, p. 111.

[28] Fr. Laurent, *Droit civil international*, IV, p. 538.

[29] *Cf.* also the definitions of public ordre by Fedozzi, *Quelques considerations sur l'idée d'ordre public*, Clunet, 1897, XXIV, pp. 69, 495; Pasquale Fiore, *Diritto internazionale privato*, p. 27; "De l'ordre public en droit international privé," *Institut de Droit International*, 1910, p. 30; Report of IIIrd Commission of the Hague Conference, 1894, Acts, p. 52; Lainé, *Introduction au droit international privé*, II, pp. 195, 280; Boissarie, René, *De la notion de l'ordre public en droit international privé*, Paris, 1888, p. 165.

public order. So Laghi [30] distinguishes in this connection five classes of laws: (1) the public law in its technical sense; (2) the penal law, the police law, the law of penal procedure; (3) the private law as far as it secures general interests of the state; (4) the laws on good morals; (5) the prohibitive laws.

Fiore [31] proposes to define the international public order as embracing all law "*quod ad statum rei publicae spectat;*" that is, the public law of a state, and the law "*quod ad universitatis utilitatem spectat,*" the "social" law. Thereafter he gives a detailed list of laws covered by these formulas. Pillet [32] enumerates the penal law, laws concerning the condition of ownership of immovables, laws of procedure, laws "*de credit public*" and laws protecting good morals.

In his Project of a code of International Law, 1925, Bustamante proposes the following classification of laws as belonging to the international public order: (1) the constitutional law (Art. 4); (2) all rules for individual and collective protection established by the political law and the administrative law, except the case where they are expressly exempt from the international public order (Art. 5).[33] Article 6 of his Project states that for the cases not provided for by the code a certain state for its jurisdiction may complete this list by declaring other legal institutions and relations as parts of the international public order.

André Weiss defines the international public order as embracing [34]: (1) the public law of a state, containing the constitutional law, the law of procedure and organization of the courts, and the law governing the régime and organization of land ownership; (2) the law having a penal character; (3) other principles of law not susceptible of systemization, with the purpose of protecting the economic, moral or religious interests of the political society.

Long before the French-Italian-Spanish school created the doctrine of the public order, Savigny [35] stated in his *System des heutigen römischen Rechtes*, that the application of foreign laws shall be excluded, (1) if laws of an absolute, positive and obligatory nature of the state would be affected (*e.g.*, prohibition of polygamy); (2) if foreign legal institutions are in question, which in the state having jurisdiction are not recognized nor sanctioned at all (*e.g.*, slavery).

The modern German doctrine, especially since the introduction of the German Civil Code in 1900, declares that the exception must operate

[30] Laghi, *Il diritto internazionale privato nei suoi rapporti colle leggi territoriali*, Bologna, 1888, p. 185.

[31] See *Sulla limitazione dell' autorita*, etc., pp. 24–26.

[32] A. Pillet, *Droit international privé*, 1923, Vol. I, pp. 116–7.

[33] *Cf.* also the five classes of laws of the international public order in Bustamante's earlier publication, *El orden público*, Habana, 1893, pp. 82–89, 207, 235; see also J. Matos, *Derecho internacional privado*, Guatemala, 1922, pp. 129–137.

[34] A. Weiss, *Manuel de droit international privé*, pp. 376–8.

[35] Savigny, *System des heutigen römischen Rechtes*, 1849, Vol. VIII, pp. 33, 160 *et seq.*

every time the application of foreign laws would be against, (a) good morals; (b) the purpose of a German law. The German doctrine avoided, when possible, speaking of "public order," and Kahn[36] directed a most vehement attack against the entire French-Italian-Spanish doctrine of public order. He rejected its method of trying to explain the exception by enumerating laws of an international public order and of stating that, whenever such laws are affected, foreign law should be disregarded.[37]

The modern German doctrine also asks if the public order of a state is really endangered when the exception is applied; for example, if the fundamentals of legislation and good government would really be shaken when a court recognizes or refuses the claim of a polygamous foreigner to the restitution of conjugal rights with one of his wives who had eloped. This will not affect the public order as such. It might merely hurt our *conception* of the public order if the marital rights of such a husband should be enforced.[38] German writers[39] show further that it depends entirely upon the peculiarities of each case whether the exception will operate or not. In one case, for instance, laws permitting polygamy might be taken into consideration, in another case, not.[40]

Bar[41] showed that the purpose of the exception is never to override entirely the institutions of the differing foreign law, but only those incidents of the foreign institutions which prove immoral or against the social conceptions of the state having jurisdiction. He invented the picture of the tree and its branches. Only those branches which extend over another territory are to be cut down by the exception, and the exception must not fell the trunk which grows on foreign soil.

Likewise Niemeyer[42] stresses the fact that it is impossible to enumerate and determine absolute obligatory laws, or laws of an international public order, because the same laws can in one case override foreign law and in another yield to its recognition and enforcement.[43]

[36] See Jhering's *Jahrbücher*, Vol. 39, pp. 1–113.

[37] *Cf.* also the criticism of the doctrine of public order by J. H. Beale, Conflict of Laws, p. 78: "Agreement on what laws are of public order is very difficult to attain, and the principle is therefore vague and ambiguous. Like all the theories of the statutists, it bears the marks of having been worked out in the closet instead of in the courts. This difficult and uncertainty of application seems to be sufficient argument against the adoption of this theory."

[38] *Cf.* Klein, "Die Lehre vom ordre public," *Archiv für bürgerliches Recht*, Vol. 29, p. 311, and especially p. 326.

[39] *Cf.* Klein, *ibid.*

[40] See, for examples, *infra*, p. 247.

[41] Bar, *Internationales Privat-und Strafrecht*, 1882, pp. 108 *et seq.* *Theorie and Praxis des Internationalen Privatrechtes*, 1889, Vol. I, pp. 92 and 127.

[42] Theodor Niemeyer, *Das Internationale Privatrecht*, 1896.

[43] *Cf.* also Ernst Zitelmann, *Internationales Privatrecht*, 1897, Vol. I, pp. 317–392. He states also the new point that the exception of public order, or the "*Vorbehaltsklausel*," as he calls it, may be applied if the foreign law is in opposition with *international law*. This proposition supported by Meili and Mamelok (*Internationales Privat-und Zivil prozessrecht*, 1911, pp. 15 *et seq.*) is refused by modern writers as Weber, p. 101 (see *infra*, p. 247) and Walker, p. 27 (see *infra*, p. 247.).

That the single case must be the starting point of any discussion of whether the exception shall operate or not, is especially emphasized by Klein.[44] It does not depend upon the fact that the foreign law on which the case is based is absolutely different from ours, but upon the fact that the granting of the request of the parties in a given case would do violence to the morals and social conceptions of the population. He illustrates this statement as follows:[45]

(1) A polygamous Asiatic sojourns with his wives in Berlin. The third spouse, being her husband's latest wife, elopes with a German who intends to marry her. In this case, it is contended, a German court will not recognize the marital rights of the Asiatic and will not force the woman to return to her polygamous husband.

(2) But a polygamous relationship will be recognized and the claim will be enforced in the following case: A German creates in Köln a trust for the benefit of his future children. After having left Germany for Asia where he became a Mohammedan, he marries three women. The son of his third wife, after the death of his father, goes to Germany and claims the benefit of his father's trust. His claim will be enforced because he will be recognized in Germany as a legitimate child.[46]

Klein's conclusions are that the exception operates only in a very restricted field, not when the foreign law itself is contrary to public order, but only when the enforcement of it in a given case would be against the moral and social conceptions of the population. This distinction between the recognition of the foreign law as such and the non-enforcement of its incidents can also be found, to a certain extent, in later discussions of the French-Italian-Spanish school.[47]

Turning to the most recent studies on the subject in the German literature, Weber[48] is of the opinion that the exception must exclude the foreign law if its recognition means that the enforcing state would logically put itself in contradiction to the fundamental principles governing its own law. The German school[49] discusses these principles under the division of (a) principles of good morals; and (b) other principles which ask for absolute recognition and which are to be found by an interpretation of the purpose of the laws. It is usually admitted that in the case where, through application of the exception of public order, a gap is created, this gap should be filled in by the local law.

[44] Peter Klein, "Die Lehre vom ordre public," in *Archiv für bürgerliches Recht*, Vol. 29, pp. 311 *et seq.*

[45] *Ibid.*, pp. 327.

[46] Equally this son will be recognized as legitimate in all questions of inheritance.

[47] See, *e.g.*, P. Fiore and Weiss cited above.

[48] *Die Lehre vom ordre public international*, Zurich, 1922, pp. 72 and 76. Compare also P. Mutzner in Gmür's *Kommentar zum schweizerischen Zivilgesetzbuch*, Schlusstitel, Art. 2.

[49] *Cf.* especially G. Walker, *Internationales Privatrecht*, 3. Auflage, Wien, 1924, pp. 241 *et seq.*, and H. Habicht, *Internationales Privatrecht nach dem Einführungsgesetz zum B. G. B.*, Berlin, 1907.

It is very interesting to observe that the modern French treatises on the subject come to nearly the same conclusions as the latest German writers. Thus, P. Arminjon,[50] in his *Précis de droit international privé*, 1925, summarizes his studies on the exception [51] of public order as follows: "(1) l'objet des règles de rattachement purement national (of the exception of public order) n'est pas de maintenir l'ordre public, mais seulement d'obtenir une solution juste et utile en apportant les exceptions necessaires aux règles de rattachement (rules of conflict of laws); (2) Les règles de rattachement purement national (exception of public order) ne dépend pas de la décision arbitraire du juge ou de l'autorité saisie de la question, elles doivent être cherchées dans la législation ou la coutume du système juridique où la question se pose." The judge is advised by the author to do this "en recherchant l'intention qui a vraisemblablement inspiré la disposition dont il doit detérminer la portée absolue ou relative." [52]

Arminjon touches also the controversy as to how far the application of the exception should be left to the discretion of the judge. His opinion is identical with the German conception, that the legislator should define the exception of public order as far as possible, that is, that the legislator in formulating the exception shall not speak of a "public order," which term seems to be much too vague and too indefinite; but that the formulation shall state that the purpose of the domestic legislation or the good morals of the place are endangered if the foreign laws were enforced. It is finally stated that the judge in defining good morals and the purpose of the legislation should not decide this question exclusively from his personal point of view, but should consider what is the conception of the great majority of the population on these fundamental principles.

In the Anglo-American literature of conflict of laws, the exception of public order has on the whole not received as much attention as on the European Continent. A discussion of the rule is mostly to be found in Anglo-American treatises under various topics, as in connection with the discussions of immoral and illegal marriages or contracts.

Discussing contracts Dicey [53] states the principle as: "English courts cannot be used to enforce contracts which violate English law, or which are opposed to English interests of state, to the general policy of English law, or, if we may use a very vague term, to the morality upheld by English law."

Minor [54] made a general comparison of the American cases where foreign law was not enforced. The field where the exception of public order is operative in American law is pointed out by him as: (1) where the enforce-

[50] *Cf.* also P. Poullet, *Manuel de droit international privé belge*, 1925, pp. 371, 380.
[51] At p. 180.
[52] *Ibid.*, p. 159.
[53] A. V. Dicey and A. B. Keith, Conflict of Laws, 3d ed., 1922, pp. 593–4.
[54] Raleigh C. Minor, Conflict of Laws, Boston, 1901, pp. 9 *et seq.*

ment of the foreign law would contravene some established and important policy of the state of the forum; (2) where the enforcement of such foreign law would involve injustice and injury to the people of the forum; (3) where such enforcement would contravene the canons of morality established by civilized society; (4) where the foreign law is penal in its nature.

The Anglo-American writers have not tried to reduce the exceptions of public order to one short and precise formula, nor to create a special doctrine of the public order, as has been attempted on the European Continent.

V. The Application of the Exception of Public Order by Courts, Particularly in Modern Russian Cases

The application of the exception in practice shows as much variety and divergence at different times and in different places as the opinions just discussed. Kahn dared to say in 1898 quite frankly that any exception of a general rule, any more special, newly discovered rule of conflict, any alteration of an established rule of conflict, used to be introduced in courts under the cover of the exception of public order.[55] He illustrates this statement by a long list of cases in civil law and common law jurisdictions. The changing of the public order and the conceptions of it may have caused a different application of the exception even in one and the same state. As an example, the Austrian practice may be cited, which, until 1907, considered as belonging to the international public order of Austria, (a) the prohibition that a Catholic husband or wife may not obtain a divorce and may not enter into a second marriage; (b) the prohibition of marriage between Christian and non-Christian parties. They did not recognize any marriage celebrated under foreign law not in harmony with these prohibitions.[56] In 1907 this practice was changed and foreign law became recognized and enforced in the same instances.[57]

A general application of the rule has always been made in Christian jurisdiction in cases of polygamy,[58] and incestuous marriages.[59] The institution of slavery is cited as a classic example of foreign law which is not recognized or enforced. Contracts which may be valid according to foreign laws, but which are considered as immoral or illegal by local legislation, have not been enforced many times on the ground of the exception of public order. Smuggling contracts, gambling contracts, contracts with

[55] Kahn, *supra*, p. 108.

[56] See Pfaff und v. Schey, "Sammlung von zivilrechtlichen Entscheidungen," etc., *Neue Folge*, No. 3334 (Feb. 21, 1906), No. 2394 (July 1, 1903), No. 2817 (November 3, 1904), and Code, §§ 64 and 111.

[57] *Ibid.*, *Neue Folge*, No. 3811 (June 18, 1907).

[58] List of English cases in Westlake (Bentwich), Private International Law, 7th ed., 1925, p. 69. See also J. A. Foote, Private International Jurisprudence, 4th ed., 1914, p. 98, Commonwealth *v.* Lane, 113 Mass. 458 (1873). Exception denied in Sadie Kapigian *v.* Krikor der Minassian, 212 Mass. 412 (1912).

[59] Foote, *supra*, p. 99.

the enemy during time of war, etc., have been disregarded because they were against public policy and good morals.

An interesting example of the application of the exception of public order is the case of Prentis *v.* Savage. An insolvency law of a foreign country, by which debtors were released from all demands against them upon surrendering their effects for the benefit of their creditors (the same effects to be distributed only among such creditors as should apply within thirty days after public notice of such surrender), was not recognized beyond the jurisdiction of the government where it was made. It was held to have no effect in respect to such debt as might be due to persons living in other countries. Parker, C. J., states that such law comes within the well-known exception of public order.

These examples of the application of the exception of public order prior to the World War will not be discussed here further. They are completely collected and discussed in the aforementioned treatises.[60] A thorough consideration, however, will be given to the modern Russian cases in which the exception recently was invoked, and where the effect of Soviet law was denied in many instances on the ground of the exception.

THE EXCEPTION OF PUBLIC ORDER IN MODERN RUSSIAN CASES

The exception has been invoked principally in two kinds of cases. It was applied, on the one hand, to deny the effects of Soviet laws of expropriation, and, on the other hand, to prevent the enforcement of the Soviet law of succession. By a decree of the 14th (27th) of April, 1918, private rights of inheritance were completely abolished in Soviet Russia.[61] On the 22nd of May 1922, however, the law of succession was reintroduced to the extent that up to the sum of ten thousand gold rubles the rights of inheritance were reëstablished for husband and descendants and for persons in the same household if incapable of working. This principle has passed into the new Russian Civil Code in force since January 1, 1923.[62] All other persons are incapable of inheriting, and any amount surpassing ten thousand gold rubles will fall into the treasury of the state. Shortly after the establishment of the Soviet régime private property was nationalized. The property of private individuals and of corporations was expropriated, and Russian expropriation was naturally an expropriation without indemnity. On December 14 (27), 1917, the banks were nationalized by a decree of the Soviet Government,[63]

[60] See, for American cases: E. G. Lorenzen, Cases on the Conflict of Law, 1924, p. 1090, under non-recognition and non-enforcement; American and English cases: Hugh H. L. Bellot, Analysis of Foote's Private International Law with cases; J. Westlake (Bentwich), Private International Law, 1925, p. 308; Swiss cases: H. Weber, *supra*, p. 109; German cases: *Soergels Rechtsprechung*, Notes to Art. 30 of the Introductory Act to the Civil Code; *Entscheid. des Reichsgerichts*, Vol. 93, p. 183.

[61] For a French translation of this decree see Raoul Labry, *Une legislation communiste*, 1920, pp. 45–47. [62] Art. 416–418. [63] Labry, *supra*, p. 294.

which provided in paragraph 3: "The assets and liabilities of the liquidated private banks are taken over by the Bank of the People." On January 26, 1918, the Russian commercial fleet was confiscated, and successively the entire private industry was transferred from their private owners to the Soviet régime.[64]

Very soon the question arose as to how far the courts of non-communistic states were bound by private international law to enforce this communistic legislation. In some of the states which denied recognition to the Soviet Government the courts disregarded the entire Soviet legislation. In the United States of America the courts argued that, as the Soviet régime was not recognized, it was incapable of creating law from their point of view. Hence the recognition and enforcement of such decrees could be refused as a whole in the United States.[65] "Problems not easy to solve have followed in the wake of the refusal," [66] comments Judge Cardozo in Sokoloff *v.* National City Bank. He continues later:

> Courts of high reputation have held that confiscation by a government to which recognition has been refused, has no other effect in law than seizure by bandits or by other lawless bodies. It would be hazardous, nonetheless, to say that a rule so comprehensive and so drastic is not *subject to exceptions under pressure of some insistent claim of policy or justice.* . . . Judicially, a government that is unrecognized may be viewed as no government at all. . . . In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War. In those litigations, acts or decrees of the rebellious governments, which, of course, had not been recognized as governments *de facto*, were held to be nullities when they worked injustice to citizens of the Union, or were in conflict with its public policy. *On the other hand, acts or decrees that were just in operation and consistent with public policy, were sustained not infrequently to the same extent as if the governments were lawful.* . . . At the utmost, they suggest the possibility that a body or group which has vindicated by the course of events its pretentions to sovereign power, but which has forfeited by its conduct the privileges or immunities of sovereignty, may gain for its acts and decrees a validity quasi-governmental, if violence to fundamental principles of justice or to our own public policy might otherwise be done.[67]

[64] For nationalization decrees see Labry, liste, p. 587.

[65] For the practice of American courts in Russian cases see O. K. Fraenkel, A Digest of Cases on International Law Relating to Recognition of Governments, 1925; 35 Yale Law Journal, p. 98; 25 Columbia Law Review, p. 544; 22 Michigan Law Review, p. 118; 38 Harvard Law Review, p. 819.

[66] 239 New York, 164.

[67] In Sokoloff *v.* National City Bank, the exception of public order was not applied, however. The question was as to the liability of an American bank for an account opened for the plaintiff in its Russian branch which was later nationalized. It was held that the enforcement of the liability was not such an injustice or so contrary to public policy as to necessitate the application of the exception. But (*cf.* also the Harvard Law Review, April, 1925) the theory developed in this case will probably be of great practical consequence in the future.

This statement is nothing else but an inversion of the exception of public order. Instead of saying Soviet decrees are law but they will not be enforced if in a given case it is against public order, the court says: Soviet decrees are not law; but, exceptionally, when such non-recognition would lead to a result in opposition to public order, these decrees, nevertheless, will be enforced like law.[68]

The Federal Court of Switzerland, which country likewise has not recognized [69] the Soviet régime, takes another point of view in Hausner *v.* Banque Internationale de Commerce de Petrograd.[70] It recognizes as law the Soviet decree nationalizing the Russian banks. "The non-recognition of the Soviet Government has the sole consequence that, in the field of international law, this government has no qualification for representing Russia in Switzerland, either in matters of public law or in those of private law. But this circumstance does not prevent the Russian law from existing and from having its effects." Such a point of view, however, does not mean that in Switzerland the effect of the Soviet legislation will be recognized in its totality. The expropriation of private property may be considered as against the international public order in certain cases, and then Soviet law may not be enforced in Switzerland on the ground of the exception of public order. Such a construction is already indicated in the opinion of the court: "That what in the particular case might be contrary to the public order is the confiscation without indemnity of the assets of the banks." This shows that the exception of public order may be used in Switzerland to avoid the consequences of Soviet laws, which are against the public order laid down by Swiss legislation. Whether the enforcement of Soviet confiscation decrees is against the public order of Switzerland has, as far as we know, not yet been decided.

Of importance in this connection will be two Swiss cases on the French confiscation laws directed against the *Ordre des Pères Chartreux*,[71] where it was held that such confiscation based on political reason, not recognized in Switzerland, will not be enforced by Swiss courts. "One cannot recognize the consequences of such a law in a state whose public law does not admit the confiscation of private property." [72] Under the exception of public order, the effects of the confiscation by the French legislature in its fight against religious orders were denied in the Swiss jurisdiction.

[68] See also James & Co. *v.* Second Russian Insurance Co., 239 N. Y. 248 (1925).

[69] Concerning the recognition of the Soviet régime, the Department of State at Washington gave, in November, 1925, the following information: Full recognition has been accorded to the Soviet Government by Germany, Esthonia, Lithuania, Latvia, Finland, Persia, Afghanistan, Turkey, Poland, Great Britain, Italy, Norway, Austria, Greece, Sweden, China, Denmark, Mexico, France and Japan. Czechoslovakia has concluded a trade agreement with the Soviet régime.

[70] *Arrêts du Tribunal Fédéral Suisse*, Vol. 50, II, 507 (512), (Dec. 10, 1924).

[71] *Ibid.*, Vol. 39, II, pp. 640 *et seq.* *Ibid.*, Vol. 32, I, pp. 157 *et seq.*

[72] *Ibid.*, Vol. 39, II, p. 652.

On the effect of Soviet confiscation decrees in French territory, the *Tribunal Commerciale de Marseille* decided on April 23, *in re Etat Russe* v. *Cie Russe de Navigation à Vapeur et de Commerce* (Ropit):[73]

> The Soviet decree of January 26, 1918, which proclaimed the nationalization of the Russian merchant marine without according the least indemnity to the dispossessed owners . . . reflects a political and social conception which is in complete opposition to our legislation based on respect for private property. This decree being contrary to the public law in France, cannot be sanctioned by the courts.

Hence the court dismissed on the ground of the exception of public order, the claim of the Russian Government asking a French tribunal to enforce the above-mentioned decree against ships belonging to a private corporation before the Russian Revolution and lying in French ports.

A similar decision is that of the Civil Court of Rome, January 23, 1923,[74] *in re Federazione Italiana dei Consorzi agrari di Piagenza v. Commissariato per il Commercio estero della Republica Socialista dei Soviet di Russia ed altri.* The court held that a foreign statute authorizing the foreign government to confiscate private property of Italian citizens residing in Russia would not be enforced in Italy.[75]

A Greek court considered in 1924 the effect of the Soviet law of succession in Greece.[76] A Russian citizen who died in February, 1920, had constituted the plaintiff universal legatee. The plaintiff brought an action against the National Bank of Greece to surrender the deposits of the deceased to the plaintiff as testamentary successor. According to Article 5 of the Greek civil law this succession was to be governed by Russian law. The court, however, refused to enforce the Soviet law of succession, which declared this testament void, as we have seen above. The recovery was allowed to the legatee on the ground of the exception of public order contained in Article 8 of the Greek law.[77]

In England the courts applied the exception in a case of the *Ordre des Père Chartreux* similar to the Swiss cases mentioned above. *In re Loecouturier* v. *Rey*, the French law confiscating the property of that religious association was not enforced in England because, it was held, enforcement of it would

[73] Clunet, 1924, pp. 391 *et seq.*

[74] Clunet, 1924, Vol. 51, p. 257; *Giurisprudenza Italiana*, 1923, Vol. 75, pp. 131 *et seq.*

[75] The same position was taken by the Tribunal Civil de la Seine *in re Bounatian v. Société Optorg*, December 12, 1923. Clunet, 1924, p. 258.

[76] Tribunal of Athens, January, 1924, No. 5641—Thémis, tome XXXV, p. 603. Clunet, 1925, p. 1143.

[77] *Cf.* decision of the Tribunal sommaire d'Alexandrie, January 24, 1925, which also did not enforce the Soviet law of succession, but held that the old Russian law applied to succession of Russian citizens. Clunet, 1925, p. 476. *Cf.* also a decision of the Civil Court of the Canton, Berne, Switzerland, of July 21, 1924 where the Soviet law of succession was not enforced, not on the ground of the exception of public order, but because the Soviet régime was not recognized in Switzerland.

have been against the public order.[78] The problem came up also in a Russian case Luther *v.* Sagor in 1921. The plaintiff, a private corporation, had property in Russia which was confiscated by the Soviet règime. The defendant purchased from the Soviet part of this property and imported it into England. The plaintiff, as expropriated owner, claimed a declaration from the court that he was entitled to this property. In the first instance the court held that as His Majesty's Government had not recognized the Soviet régime, its decrees could not be regarded as valid statutes and that the plaintiff was still the owner of the imported goods. The Court of Appeal, however, held that, as the government had in the meantime recognized the Soviet régime, the validity of the nationalization decrees and the sale of the property to the defendant could not be impugned, and that the latter was entitled to judgment.[79]

The upper court considered carefully whether, notwithstanding the recognition of the Soviet decrees as law, the exception of public order would prohibit the recognition of the Russian law in this particular case. But the court held that it was not against the public order of England to enforce the rights of the defendant who purchased the goods in Russia, and therefore the effect of Russian law was fully recognized. That is the only thing which this case decided, and we consider any further statement in the opinion of Lord Justice Scrutton upon the content of the exception of public order as *dicta*. This decision must be interpreted in our opinion as holding that it is not considered to be against the public order in England to give protection to the title of property which the holder has secured from the successful revolutionary government quite independent of the fact that this property had been expropriated in Russia without indemnity. The cardinal point that led to the protection of the defendant was that he was a purchaser for value.[80] Lord Justice Scrutton, however, goes very far when he argues that the exception of public order could not operate in this case because "it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality.'" This statement would do away with the exception of public order in England for all times, if followed by the English courts; for that would mean that the exception could no longer operate against the law of all other states recognized by the British Government, in order to avoid the "serious breach of international comity."

In view of the precedents in English case law as Simpson *v.* Fogo [81] and Kaufman *v.* Gerson, [82] one might ask, however, whether the exception will not operate also in England against Soviet law in cases like the *Etat Russe* v.

[78] 1910, A. C. 262.

[79] 1921, 3 K. B. 532.

[80] Such a decision is also in harmony with American law (Terrazos *v.* Holmes, 225 S. W. 848) and the latest development in the doctrine of the exception of public order.

[81] 1 H. & M. 195, 247.

[82] 1904, 1 K. B. 591.

Cie Russe de Navigation before the Marseilles court. That is, in the question whether Soviet decrees confiscating Russian property *abroad* should be enforced. "The English courts have not hitherto considered whether the legislative acts of the Soviet Government nationalizing property may be disregarded on the ground that they are contrary to public policy," one reads in Westlake (Bentwich), Private International Law (edition 1925, p. 433). This statement is fully justified in spite of the case of Luther *v.* Sagor.

In Germany the situation concerning the enforcement of Soviet law is a particular one due to the special treaties [83] and to the doctrine of *renvoi* recognized by the Introductory Act to the Civil Code in Article 27. Freund [84] is of the opinion, and on this question there is unanimity, that the Soviet law of 1918 abolishing succession entirely could not be enforced in Germany on the ground of the exception of public order. The new Soviet succession law he holds, however, is not against the international public order of Germany and should be enforced.[85] Rabinowitsch [86] disagrees and argues that also the new law of succession should not be enforced in Germany on the ground of the exception of public order. He shows further that even if this view could not be accepted, the Soviet law of succession must be excluded by reason of the *renvoi* of Article 27. Soviet law demands the application of the territorial law to determine the rights of successions of foreigners.[87] Foreigners in Russia inherit according to Soviet law, and Rabinowitsch concludes upon the basis of Article 27 that Russians in Germany inherit according to German law. Freund's [88] general conclusion is that the exception of public order cannot override the totality of the Soviet legislation in Germany. In every single case the question must be studied anew whether or not an enforcement would be against good morals or the purpose of a German law. Whenever the question is answered affirmatively, the exception of public order must operate and German law be applied.

Conclusion

The problem in this conflict between "communistic" and "capitalistic" legislation turns evidently upon the question of whether the guarantee of private property and the freedom of inheritance, abolished by the Soviet law, are essential principles of a non-communistic legal order and will, there-

[83] *Cf.* the Rapello Treaty (April 16, 1922), Moscow Treaty (Oct. 12, 1925), Berlin Treaty, (April 24, 1926); see also a decision of the *Landesgericht* of Hamburg, June 13, 1924, Hans-R. F. 1924, 749.

[84] Dr. H. Freund, *Les rapports des traités russo-allemands*, etc., Clunet, 1925, p. 33; "Das neue sowjetrussische Erbrecht," *Jurist. Wochenschrift*, 1924, p. 634. *Id.*, 1922, p. 1117.

[85] The same view is taken by C. B. Ténékidès for Greece in Clunet, 1925, p. 1143, where he attacks the decision of the Court of Athens mentioned above.

[86] J. N. Rabinowitsch, "Das neue sovjet-russische Erbrecht," *Jurist. Wochenschrift*, 1924, pp. 633–6.

[87] *Cf.* also V. Makaroff, International Private Law of Soviet Russia, Moscow, 1924.

[88] Clunet, 1925, p. 339.

fore, override any contrary law of modern Russia. In several of the cases discussed, this question is clearly answered in the affirmative. Any enforcement of Soviet decrees interfering with the rights of private property outside of Russia has been considered in those instances as contrary to the public order of non-communistic states. The exception of public order was invoked in several cases to prevent the application of Soviet laws; and it is to be remembered that this occurred in states which had recognized *de jure* the Soviet régime. In such a way the study of the exception of public order, as invoked in modern Russian cases, reveals also the fact that a recognition of the Union of the Socialist Soviet Republics did not involve in Europe an enforcement of the entire Soviet legislation outside of Russia.

CONSULAR PRIVILEGES AND IMMUNITIES UNDER THE TREATIES OF FRIENDSHIP, COMMERCE AND CONSULAR RIGHTS*

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The reëstablishment of treaty relations with Germany seems to have afforded occasion for a new type of treaty incorporating new principles, restating old ones and generally rearranging the subject-matter considered. Provisions relating to consular privileges and immunities show the influence of this new consideration. The Treaty of Friendship, Commerce and Consular Rights with Germany [1] has been followed by similar treaties with Estonia [2] and Hungary.[3] Ratification of a like treaty with Salvador has been advised and consented to by the United States Senate,[4] but the exchange of ratifications has not yet been announced. A consular convention with Cuba[5] follows the corresponding provisions in the treaties of friendship, commerce and consular rights so far as consular privileges and immunities are concerned. As press reports have indicated that similar treaties may be negotiated with other states, it is possible that there may be an extensive redefinition of consular privileges and immunities along the lines of the provisions of the recently published treaties. In the light of this possibility the contents of this part of the treaties are of great importance and an examination of them of present interest. As the Treaty of Friendship, Commerce and Consular Rights with Germany was the first of the series, the following discussion is based upon the provisions of that treaty, with attention being given to the more important departures in the later treaties.[6]

* For a discussion of the provisions of earlier treaties, see this Journal, Vol. 20, p. 81.

[1] Treaty Series No. 725. [2] *Ibid.*, No. 736. [3] *Ibid.*, No. 748.

[4] May 28, 1926. Cong. Rec., 69th Cong., 1st Sess., p. 10241. [5] Treaty Series No. 750.

[6] The provisions considered are all or parts of the following articles in the German treaty: XVII, XVIII, XIX, XX, XXVII. The corresponding articles of the other treaties mentioned are: Estonia, Articles XVI, XVII, XVIII, XIX, XXVI; Hungary, Articles XIV, XV, XVI, XVII, XXII; Cuba, Articles III, IV, V, VI, VII, VIII, XVI; Salvador, Articles XV, XVI, XVII, XVIII, XXV. As contained in the German treaty the provisions are:

Article XVII. . . . Consular officers of each of the High Contracting Parties shall, after entering upon their duties, enjoy reciprocally in the territories of the other all the rights, privileges, exemptions and immunities which are enjoyed by officers of the same grade of the most favored nation. As official agents, such officers shall be entitled to the high consideration of all officials, national or local, with whom they have official intercourse in the state which receives them. . . .

Article XVIII. Consular officers, nationals of the state by which they are appointed, shall be exempt from arrest except when charged with the commission of offenses locally designated as crimes other than misdemeanors and subjecting the individual guilty

The first major privilege is that of consular exemption from arrest except in case of the commission of offenses locally designated as crimes other than misdemeanors and punished as such.[7] That freedom from unnecessary restraint is essential to the proper exercise of the consular functions cannot be doubted; while the interest of the receiving state in the enforcement of its laws and the protection of its citizens is not open to question. In this situation, international law has not given to consuls the exemption from arrest for

thereof to punishment. Such officers shall be exempt from military billetings, and from service of any military or naval, administrative or police character whatsoever.

In criminal cases the attendance at the trial by a consular officer as a witness may be demanded by the prosecution or defense. The demand shall be made with all possible regard for the consular dignity and the duties of the office; and there shall be compliance on the part of the consular officer.

Consular officers shall be subject to the jurisdiction of the courts in the state which receives them in civil cases, subject to the proviso, however, that when the officer is a national of the state which appoints him and is engaged in no private occupation for gain, his testimony shall be taken orally or in writing at his residence or office and with due regard for his convenience. The officer should, however, voluntarily give his testimony at the trial whenever it is possible to do so without serious interference with his official duties.

ARTICLE XIX. Consular officers, including employees in a consulate, nationals of the State by which they are appointed other than those engaged in private occupations for gain within the State where they exercise their functions shall be exempt from all taxes, National, State, Provincial and Municipal, levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in, or income derived from property of any kind situated or belonging within the territories of the State within which they exercise their functions. All consular officers and employees, nationals of the State appointing them shall be exempt from the payment of taxes on the salary, fees or wages received by them in compensation for their consular services. . . .

ARTICLE XX. Consular officers may place over the outer door of their respective offices the arms of their State with an appropriate inscription designating the official office. Such officers may also hoist the flag of their country on their offices including those situated in the capitals of the two countries. They may likewise hoist such flag over any boat or vessel employed in the exercise of the consular function.

The consular offices and archives shall at all times be inviolable. They shall under no circumstances be subjected to invasion by any authorities of any character within the country where such offices are located. Nor shall the authorities under any pretext make any examination or seizure of papers or other property deposited within a consular office. Consular offices shall not be used as places of asylum. No consular officer shall be required to produce official archives in court or testify as to their contents. . . .

ARTICLE XXVII. Each of the High Contracting Parties agrees to permit the entry free of all duty and without examination of any kind, of all furniture, equipment and supplies intended for official use in the consular offices of the other, and to extend to such consular officers of the other and their families and suites as are its nationals, the privilege of entry free of duty of their baggage and all other personal property, whether accompanying the officer to his post or imported at any time during his encumbency thereof; provided, nevertheless, that no article, the importation of which is prohibited by the law of either of the High Contracting Parties, may be brought into its territories.

It is understood, however, that this privilege shall not be extended to consular officers who are engaged in any private occupation for gain in the countries to which they are accredited, save with respect to governmental supplies.

[7] Article XVIII.

acts which contravene the local order. Attorneys General of the United States have held that foreign consuls are subject to civil arrest;[8] and while a Secretary of State many years ago endeavored to prove to France that an American consul in that state was not subject to imprisonment for assault, his efforts were based upon his understanding of the practice of France in similar cases.[9] Relief from the inconvenience of a possible arrest must depend upon conventional stipulation, and provisions designed to effect this have been carried in a number of treaties.

The consular convention of 1853 with France was the earliest important treaty carrying the provision for this exemption;[10] the provision was for personal immunity except in case of crimes, which has been interpreted to mean freedom from arrest and not freedom from suit. The later clauses have specified that the immunity is from arrest, and so remove all doubt on this point. With one exception [11] every treaty dealing with this subject since 1868 has stated that the crime must be so defined by local law. A limitation of the provision by way of definition is carried in two treaties [12] which stipulate that the consul may be arrested for crimes or misdemeanors. This constitutes an important restriction of the privilege as the word "crime" in itself might exclude minor offenses, and specifically subjects the consul to arrest for breaches of minor local ordinances. With these exceptions there is no mention of misdemeanors prior to the treaty under consideration.

The fact that the United States by specific provision in two treaties acknowledged the liability of consuls to arrest for misdemeanors might be adduced as evidence of an intention to exempt them from arrest in such cases under treaties which forbade the arrest of consuls except for crimes. The treaty under consideration, however, leaves no room for doubt on this point. Of necessity there must be a nice balancing of the consul's need for a large freedom with the state's interest in the observance of its laws and the preservation of order. At no time has there been any indication that the United States would countenance a relinquishment of its right of jurisdiction in major matters; but the present treaty decides that the needs of the consular business are to be given preference over immediate reproval for a slight deviation from the path of strict legal rectitude. Considering the possibility of infinite annoyance to consular officers in an extremely rigid enforcement of numerous petty ordinances in some states, it seems that the United States has chosen the better way. Sufficient protection for the receiving state is to be had in the right to call infractions to the attention of the appointing gov-

[8] Lee, Atty. Gen., Nov. 21, 1797, I Op. 45; Wirt, Atty. Gen., Dec. 1, 1820, I Op. 300. And see Atty. Gen. Butler's opinion of September 16, 1835 in I Op. 1005.

[9] Forsyth, Sec. of State, to Mr. Cass, Dec. 6, 1836, Moore, Digest, Vol. V, p. 68; same to same, April 13, 1838, *ibid.* Compare Clayton, Sec. of State, to Mr. Calderon de la Barca, Aug. 28, 1849, *ibid.*, p. 34, to the effect that a consul is liable for a violation of the criminal laws of the country of his residence.

[10] Article II.

[11] Consular convention of 1871 with Germany, Article III.

[12] Netherlands, 1878, Article III; Spain, 1902, Article XV.

ernment and to revoke the exequatur should such an extreme measure at any time seem desirable.

Clearly under a general provision of this nature there is a possibility of a lack of reciprocity. The line between "crimes other than misdemeanors" and "misdemeanors" is not unchanging, nor is it fixed in all states at exactly the same place. In a state which makes "crimes other than misdemeanors" of what are ordinarily considered minor offenses, the consul's freedom from arrest will necessarily be more restricted than in a state where crimes other than misdemeanors are really major offenses and the list of misdemeanors correspondingly large. It would seem, however, that the interests of a state of the latter class will not be jeopardized: the immunity from arrest is designed solely to expedite the consular business by protecting the consul from detention for a minor offense. Should the consular officer persist in the violation of local ordinances, his actions would afford ground for a request for his recall. The other extreme is the one which might possibly defeat the purpose of the provision; for where the list of "crimes other than misdemeanors" is extended, the consul may find himself restrained for some minor offense. This possibility of an application unequal in its practical effect is a necessary incident to the right of each state to define misdemeanors. Other modes of treatment would be the specification in the treaty of the offenses for which arrest could not be made—which obviously would not be desirable—and a simple statement requiring reciprocity—which seems to be contrary to the treaty policy of the United States.

The exemption from military and naval service and from military billetings are the same in purpose if not in letter as those provided in most of the treaties in which attention is paid to consular privileges.[13] Like the exemption from arrest just discussed, this privilege is conferred only upon consular officers who are nationals of the state by which they are appointed. While the term "service of an administrative or police character" used in the present treaty to define the exemption from public civil service is a new one in American treaties, the same end has been attained in a large number of conventions which contain an exemption from all public service. It has been decided in connection with an earlier treaty that exemption from military billetings and service includes exemption from any tax which may be levied upon the inhabitants in lieu of the billetings or service.[14]

Necessity for the consul's personal appearance at trials in the capacity of witness may seriously interfere with the conduct of the consular business. It is perhaps unfortunate that no rule of international law has been developed to protect consuls from undue interference in this regard. Treaties protecting the consular business in some measure from undue encroachments of this character were late in appearing. Though the first consular convention [15]

[13] Article XVIII. The provision in the Cuban consular convention, Article VI, is more extensive than this in that it also exempts the consul from "every class of requisitions."

[14] Foreign Relations, 1871, p. 272.

[15] With France.

entered into by the United States bears the date 1788, no mention of the consul's appearance as witness is to be found in American treaties before 1850; and then the provision was simply one requiring that consuls be requested in writing to appear in court when their presence should be desired.[16] Article II of the consular convention of 1853 between the United States and France gave consuls a complete exemption from personal appearance as witnesses. Dillon's case was the almost immediate result; and weighty grounds were found for the contention that the executive department had overstepped the constitutional bounds and that the provision conflicted with the Sixth Amendment to the United States Constitution.[17]

Later conventions have avoided this difficulty; distinctions have uniformly been made between personal appearance in civil and in criminal cases. In the former situation the provision usually is that the consul shall comply with a request for his personal appearance when his doing so would not interfere with his official duties; where personal appearance would result in such interference the desired testimony is to be obtained orally or in writing at the consular office or dwelling. But in criminal cases coming within the Sixth Amendment the right of the defendant to have witnesses in his behalf is recognized, and compulsory process may issue. A few conventions have extended the compulsory process to cases coming under clauses of State Constitutions similar to the Sixth Amendment to the Federal Constitution. Two treaties, both entered into in 1870,[18] extend the compulsory process to all criminal cases when the testimony of the consul is necessary to the defense of the accused. The treaty under discussion accords with these last two in that compulsory process may issue in any criminal case when sought by the defense; it extends the principle to cases where the testimony is sought by the prosecution.[19]

This extension is believed to be desirable, for there seems to be no compelling reason why the defense should be placed in a more advantageous position than the prosecution. Moreover, the language in which the exemption is expressed is such that contentions which might arise from the phraseology of the earlier treaties are avoided. Thus there is no necessity for interpreting the Sixth Amendment to ascertain just what cases are contemplated by its terms. Further it is well that compulsory process is extended to all criminal cases. While a very few treaties have extended the compulsory process to cases involving state constitutional provisions similar to the Sixth Amendment to the Federal Constitution, the present treaty is more fortunate in its language since it again avoids the necessity for the interpretation of those provisions.

[16] Colombia, Article V.

[17] See *in re* Dillon (1854), 3 Fed. Cas. 914; Marcy, Sec. of State, to Mr. Mason, 1854–1855, Moore, Digest, Vol. V, pp. 78–80; Dana's Wheaton, p. 325.

[18] Austria-Hungary, Article III; Salvador, Article XXXV.

[19] Article XVIII.

Though the consul who is a national of the state appointing him and who is not engaged in any private occupation for gain may not be compelled in civil cases to appear personally as a witness, his testimony may be taken orally or in writing at his residence or office, with due regard to his convenience. This insures the uninterrupted continuance of the consular functions without unduly affecting the administration of justice in the state which has received the consul. Provisions similar to the one under consideration have been interpreted so as not to interfere with the inviolability of the consular archives as established in international law; that is, while the testimony of the consul may ordinarily be obtained, it cannot be compelled when the information forms a part of the consular archives or was secured by the consul in an official capacity.[20]

The standard usually set up to gauge the extent of consular privileges is that the consul does, or should, enjoy those exemptions which are essential to the exercise of his functions. Judged by such a standard, it has been contended from a theoretical standpoint that exemption from taxation might well be omitted. Yet the governments of the world have generally been willing to concede a limited exemption. This exemption has varied from state to state and from time to time. The policy of the United States as evidenced by treaty as well as by practice based upon reciprocity is firmly fixed in favor of the exemption.

The language used in the various treaties has not always been wisely chosen, and questions of interpretation have arisen. Provisions for exemption from direct and personal taxes occasioned considerable difficulty in fixing their exact scope. Other provisions have given rise to discussion as to the collection of customs duties. The introduction of the income tax as one of the principal sources of revenue for the state has introduced an element which had not been foreseen. Provisions of some treaties were construed to exempt the consul from the payment of a tax upon his official income; of others, to leave open the payment of such a tax. Still other provisions framed in terms broad enough to secure the exemption from a tax on official income have been liberal to an unforeseen and undesired extent and have exempted the consul also from the payment of a tax on such income as he might have from other sources in the state of his residence. Under these varying treaty provisions, and even in the absence of treaty, consuls have requested exemptions ranging from dog licenses through inheritance taxes, covering at some time or other most of the personal and property taxes and license fees levied in the United States. These calls for interpretation create a special interest in this latest expression of the policy of the United States.

The privileges granted in the present treaty extend only to those consular officers, including employees in a consulate, who are nationals of the state by which they are appointed and who are engaged in no private occupation

[20] See, for instance, Rochkill, Third Asst. Sec. of State, to Mr. Mason, July 31, 1894, Moore, Digest, Vol. V, p. 83; Hay, Sec. of State, to Mr. White, March 6, 1899, *ibid.*, p. 82.

for gain within the state in which they exercise their functions (Article XIX). The general grant is of an exemption from all personal or property taxes levied by any of the units of government. To this general grant there are two exceptions: a consul owning or possessing immovable property in the state in which he is functioning is subject to taxes levied on account of such ownership or possession; and a consul who receives an income from property of any kind situated or belonging within such state is subject to the payment of taxes levied upon that income. Barring these exceptions, the exemption from personal and property taxes is complete. It would seem that no tax whatever could be levied upon the person of the consul or on his personal property as such. The framers of the treaty recognize a division of taxes into taxes upon the person and taxes upon property; and the care with which they stipulate for exemption from these taxes indicates that so-called privilege taxes are not intended to be covered by the exemption.

Income tax exemption is specifically provided. Only one earlier treaty, the consular convention of 1871 with Germany,[21] had mentioned an income tax by name. The income tax law of the United States has been interpreted so as not to require the payment of a tax upon the consular salary where the state appointing the consul extends a similar favor to American consuls. The Government of the United States has steadily sought to obtain for its consuls an exemption from the payment of a tax upon their official income, and in some instances has succeeded without a treaty, notably in the case of Canada. In 1909 an attempt was made to get the British Government to extend its exemption from tax on the official income to cover income derived from property located outside of the United Kingdom, but the extension was refused.[22] The present treaty incorporates what must be taken as the policy of the United States: the official salary is to be exempt from taxation. Income from sources outside of the state in which the consul is resident is not directly mentioned, but it comes within the scope of the general exemption granted and may not be taxed. On the other hand, income from property of any kind situated or belonging within the territories of the state within which the consul is exercising his functions is specifically made taxable. It is to be noted that the exemption from the tax on the official income is granted to all consular officers and employees, nationals of the appointing state; while the other tax exemptions provided in this article may be claimed only by consular officers and employees who in addition to being nationals of the appointing state are not engaged in any private occupation for gain within the state in which they function.

The matter of duties charged upon the entry of official supplies and of the consul's personal effects has been studied by the Department of State upon several occasions. Here again treaty provisions have had to be interpreted and varying provisions have forced differing practices. The present treaty

[21] Article III. For an interpretation see Hill, Sec. of State, to Mr. Smith, Moore, Digest, Vol. V, p. 90.

[22] Foreign Relations, 1909, pp. 284–286.

incorporates what seems to be the policy fostered by the United States in every case where reciprocity can be obtained.[23] Furniture, equipment and supplies for official use are to be admitted free of duty without regard to the individual consul to whom they are consigned.[24] Baggage and other personal property of consuls who are nationals of the state appointing them and are engaged in no private occupation for gain in the territories of the state to which they are accredited, are also to be accorded free entry. The statement to the effect that the privilege of free entry is to be accorded whether the baggage and personal property arrives with the consul or is imported at any time during his incumbency is novel among American treaty provisions.[25] It is to be noted that the general tax exemption stated in Article XIX is specifically extended to employees of the consulate, while no such provision is to be found in the present article.

The Eighteenth Amendment is responsible for the statement in Article XXVII that no article, the importation of which is prohibited by law, may be brought into the territory of the state. The fact that diplomatic agents have not been interfered with when they have imported liquors for personal use has probably contributed in a number of cases to the attempt on the part of consuls to obtain permission to import intoxicants. Those attempts have uniformly been fruitless; the insertion of the provision in the treaty, while not affecting the legal situation, may serve to decrease the number of requests for permits.

For a long period of time it has been customary for consuls to place the arms of their state over the outer door of the office and to hoist the national flag over the consulate. The first of these practices clearly has a direct relation to the identification of the office, and its nature is not such as to give rise to any opposition. No such simple situation obtains with regard to the flag. The display of the national emblem has been governed largely by custom, and consular regulations of most states at the present time recognize that in the absence of treaty local law must govern. In this situation there has grown up the custom of unfurling the flag upon public holidays and days of mourning, both of the state by which the consul is appointed and of that to which he has been appointed. Occasionally a state has attempted to abolish the custom, but such attempts have been resisted by other states. In particular has the United States opposed efforts to restrict the display of the flag. Its stand in this respect has been such as to place it in advance of other states; for the Department of State has gone on record as claiming a right to display the flag and has intimated that this display might occur every day rather than merely upon days having a public significance.[26]

[23] Article XXVII.

[24] All of the treaties considered, except that with Estonia, provide that this equipment shall be admitted without examination of any kind.

[25] The Estonian treaty, Article XXVI, substitutes a most-favored-nation clause for this provision.

[26] Foreign Relations, 1912, p. 902.

Though custom in most consular districts might permit the hoisting of the flag, only treaty stipulation could introduce uniformity with reference to the time of the display. The provision under consideration is without qualification as to time.[27] The Department of State has indicated that one purpose of the display of the flag is to mark the location of the consular office. If that be the case, daily display is necessary; and the present treaty would seem to permit that.

Some of the earlier treaties of the United States forbade the display of the national flag in the capital of the state where a legation was established. There seems to be little reason for such a stipulation; that of the present treaty permitting such a display is to be preferred. The provision that the flag may also be hoisted over any boat or vessel employed by the consul in the exercise of the consular function is not unusual.

In a field where rules of international law are rarely definitely fixed, the inviolability of consular archives is an outstanding exception. Such inviolability is granted. There are at least two major reasons for the inviolability: the archives are the confidential information of the consul's government; and it is essential for the proper conduct of the consular business that the consul have at all times a complete and uninterrupted access to his records. The treaty stipulation in the present case serves to reinforce the rule of international law, and the terms of the treaty show how complete is the rule.[28] Thus it is that "the authorities" cannot "under any pretext make any examination or seizure of papers" in the office. The protection afforded by the provision is complete; even the courts cannot compel the production of the papers or testimony by the consul as to their contents.[29]

The legal status of the consular office is not so clear where there is no treaty. In the absence of treaty provision it is probable that properly authorized officers might enter the office. The United States has entered into a number of treaties similar to the one under consideration giving inviolability to the office. A few of these treaties have gone so far as to extend the inviolability to the consular dwelling. This seems to be going farther than is necessary and one treaty was denounced in order to eliminate such a provision.[30] There are times when an unrestricted right of entry of the consulate by the local authorities might embarrass the conduct of the consular business. To prevent such possible situations the inviolability of the office is secured by the present treaty, and it is secured in the most comprehensive terms.[31] "Under no circumstances" would seem to admit of no

[27] Article XX.

[28] *Ibid.*

[29] The Cuban treaty, Article VII, differs from the others in following the old provision that when the consular officer is engaged in business in the state which receives him, the official papers must be kept in a place entirely apart from the consul's private or business papers. This article contains an obvious typographical error in the provision, "Neither shall any consular office (*sic*) be required to produce official archives in court or testify as to their contents."

[30] The consular convention of 1868 with Italy. Foreign Relations, 1878, pp. 462–463.

[31] Article XX.

exception; and "any authorities of any character" would include any functionary of any possible description. These provisions are designed solely to expedite the consular business and may not be used by consuls to thwart the local justice. Thus, under a similar provision of the consular convention of 1853 between the United States and France, an American consul who had received from an American citizen property which French courts were about to attach, was instructed by the Department of State to surrender the property to its owner after giving notice to the proper French authorities that such surrender was to be made. In addition to the check imposed by his own government upon the actions of the consular officer, the government which receives him has always at its disposal the right to request his recall and to revoke his exequatur if he abuses his rights under the treaty.

Subject to a possible qualification based upon precedent in certain Latin American States, a consular officer has no right under international law to use his office as a place of asylum. Inasmuch as the grant of inviolability of the consulate in the present treaty is so comprehensive, it was probably deemed necessary to reaffirm this principle in the treaty almost as an instruction to consular officers.[32] The two propositions are quite distinct. There is no right of asylum; the action of a consul in granting asylum in the consulate would be beyond the scope of his authority and would render him subject to discipline by his government and to dismissal by the government which received him. Independent of this is the inviolability of the consulate. Should the consul grant asylum, his act would constitute a wrong but would not affect the inviolability of the consulate. And should officers enter the consulate and forcibly remove an individual who had taken refuge there, the act would be a violation of the treaty for which their state could be held liable.

In providing that consular officers shall be entitled to the "high consideration" of the officials with whom they have official intercourse, the treaty has gone beyond anything contained in earlier treaties.[33] It seems probable that the provision was inserted because some of the minor officials with whom consuls come in contact are none too familiar with the rules of international law and with the courtesy to which consuls are entitled. If by the insertion of this statement in the treaty the path of the consul is made smoother, the action is to be welcomed.

The consular most-favored-nation clause as contained in the treaty is of interest, not because it differs from earlier clauses of the same character, but because of its similarity to those clauses.[34] The conditional interpretation of the most-favored-nation clause which had become a fixed part of the policy of the United States is abandoned in its commercial aspects in

[32] Article XX. The Cuban treaty, Article VIII, is more detailed than the others in that it recites the consul's duty to surrender to the proper local authorities, upon demand, persons prosecuted for crime in accordance with the domestic laws of the country which receives them, who have taken refuge in the building occupied by the consular offices.

[33] Article XVII. [34] *Ibid.*

Article VII of the present treaty. As there has been no change in the phraseology of the consular most-favored-nation clause, it appears that no change in the interpretation of that clause is contemplated. In that situation the executive probably will continue to construe the clause as conditional, although the courts have assumed an unconditional interpretation.[35]

As a code of consular privileges, the treaties of friendship, commerce and consular rights contain no drastic innovations. Generally speaking, the field is one every part of which has been covered at some time or other in other treaties to which the United States has been a party. It is believed, however, that for clarity of statement, the treaty has no equal among those to which the United States has been a party. The field is covered in a sufficient manner; ambiguity has been reduced. Should this series of treaties be extended to other states, the provisions relative to consular privileges will place those privileges upon a more satisfactory basis than would those of any other treaty to which the United States has been a party.

[35] Hyde, International Law, Vol. II, p. 77.

THE EFFECT OF CHANGES OF SOVEREIGNTY ON NATIONALITY

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In the vast field of international relationships, one of the intricate problems is that which has centered around the question of nationality.[1] No uniform rules have been laid down either by conventional or by customary international law for the determination of nationality. Unfortunately the whole matter is regulated by municipal law, and in consequence of the diversity of regulations many conflicts have resulted.[2] There are additional complications encountered in that phase of the problem which deals with the relation of state succession and nationality. When a state acquires new territory by gift, cession, conquest, or by whatever means, the political status of the inhabitants of the territory must be determined. While international law provides no definite rule, it is generally stated by publicists and writers on international law [3] that the inhabitants of ceded territory automatically lose their old political allegiance and acquire that of the annexing state.[4] Ordinarily, the reservation is made that they may conserve their original nationality by means of option.[5] An investigation of treaties of cession, however, reveals that different factors have been taken into consideration in determining what individuals *ipso facto* acquire the nationality of the state to which territory has been transferred.[6] Certain principles were quite generally followed during the nineteenth and the first part of the twentieth centuries which have since been supplemented by new *criteria* introduced in the peace treaties of 1919–1920.

The principles which were observed during the earlier period were those of domicile and birth taken either singly or in combination. When domicile

[1] The term is herein used in its juridical and not in its ethnological sense.

[2] See articles by Flournoy in Yale and Colombia Law Jour. of recent years. See Garner, this Journal, July 1925, p. 547, for a discussion of conflicts of Nationality.

[3] Fauchille, *Droit International Public* (1922), Vol. 1, Sec. 427, p. 856; Westlake, International Law (1913), Part 1, p. 70; Hall, International Law (1924), pp. 685–686; Cogordan, *La Nationalité* (1890), p. 317; Phillipson, Termination of War and Treaties of Peace (1916), pp. 35–36.

[4] Several exceptions to this general practice have been made, one of the most outstanding of which is found in the Treaty of Paris of December 10, 1898, by which Porto Rico and the Philippines were ceded to the United States. The treaty provided that "the civil and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." (See Hill, Leading American Treaties, p. 343.) Congressional legislation was enacted whereby the inhabitants of Porto Rico and the Philippines respectively were declared to be citizens of the islands and entitled to the protection of the American Government. Later (1917), United States citizenship was conferred upon the citizens of Porto Rico.

[5] Discussed below, p. 270.

[6] See footnotes 27–30, inclusive, *infra*, p. 271.

alone was followed the persons affected included the native-born and the naturalized citizens, as well as the aliens domiciled in the ceded territory. When birth has been the determining factor, it has included those individuals who were born in the transferred territory regardless of domicile at the time the transfer was made. Both principles have been combined in two ways: the first, and more restrictive in its effect, has included only those individuals who were born in the ceded territory and actually domiciled there at the time of the cession; the second, and more inclusive, has embraced those who were born in the territory regardless of domicile as well as those individuals who were domiciled there at the time of the territorial transfer.[7]

With the redistribution and restoration of territory as a consequence of the World War, new principles were introduced as a solution of some of the problems peculiar to the peace settlements. An effort was made to adapt the acquisition of new nationality to existing conditions with the predominant purpose of uniting on the same territory and under a national government individuals of the same race, language, and civilization.[8] Hence there was a departure from the general practice of denationalizing *en bloc* the inhabitants of territory in which a change of sovereignty occurred, and as a result of new principles, nationality was acquired *ipso facto* only in certain cases; by reclamation and by naturalization in others; and in still other cases, only in accordance with conditions prescribed by the local laws.[9]

The Treaty of Versailles,[10] while in most cases adhering to the principle of domicile for determining changes of nationality, followed an entirely new principle for granting French nationality *ipso facto* to the inhabitants of Alsace-Lorraine, the provinces restored to France by Germany.[11] Here the principle of *lien national* was adopted for the purpose of excluding from French nationality German *immigrés* and their descendants.[12] French

[7] Phillipson, *op. cit.*, p. 294; Despagnet, *Cours de Droit International Public* (1905), pp. 368–369.

[8] Niboyet, "La nationalité d'après les traités de paix qui ont mis fin à la guerre de 1914–1918," *Revue de Droit International et de Législation Comparée*, 1921, p. 287; Engeström, *Les Changements de Nationalité d'après les traités de paix de 1919–1920* (1920), p. 8.

[9] There was a single instance in which none of the inhabitants of the territories ceded after the World War acquired *ipso facto* the nationality of the annexing state. The Treaty of Sèvres, Art. 117, Treaty of Lausanne, Art. 21, provided that upon the annexation of Cyprus by Great Britain, British nationality would be acquired only under the conditions prescribed by the local laws. See Niboyet, *op. cit.*, p. 295.

[10] Martens, *Nouv. Recueil Général De Traités*, 3 Ser., Vol. XI, pp. 323 *ff.*; Supplement to this JOURNAL, Vol. 13, p. 151.

[11] Arts. 36, 91, 84, 105, 112 of the Treaty of Versailles provide that Germans domiciled in the territories assigned to Belgium, to Poland, to Czecho-Slovakia, to Danzig, and to Denmark should lose their German nationality and acquire *ipso facto* the nationality of these states. In certain cases, however, if nationality had been acquired after a certain date, nationality was granted only upon the authorization of the state concerned. See Fauchille, *op. cit.* p. 865; Audinet, "Les changements de Nationalité Résultant des Récents Traités de Paix," *Journal du Droit International*, 1921, p. 370.

[12] Audinet, *op. cit.*, p. 379.

nationality was acquired *ipso facto* (*de plein droit*) only by those persons who had lost their French nationality by the application of the Treaty of Frankfort of May 10, 1871, and who had not since that date acquired a nationality other than German. The descendants of these persons were also included, except those whose ascendants in the paternal line included Germans who migrated into Alsace-Lorraine after July 15, 1870.[13] The other inhabitants of these provinces might become French nationals either upon reclamation [14] or by the process of naturalization.[15]

Another new principle which was introduced by two of the peace treaties for the determination of nationality was the principle of *indigénat*.[16] The treaties of St. Germain [17] and of Trianon,[18] with Austria and Hungary, both followed this principle because of the fact that in these countries, besides being the national of the state, the individual belonged to a certain commune possessing a sort of municipal citizenship designated as *indigénat*. Both Austria [19] and Hungary [20] recognized that any person having *indigénat* on the territory formerly a part of the Austro-Hungarian monarchy would lose his old nationality and acquire that of the state to which the territory was transferred.[21]

As previously stated, those classes of individuals whose nationality is affected by transfers of territory, are usually permitted to conserve their original nationality by means of option.[22] This principle is set forth by the United States Supreme Court in Boyd *v.* Thayer as follows: "Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise as may be provided." [23] While there is no unanimous agreement [24] as to the existence of option as an international rule of custom, most treaties of cession since the beginning of the nineteenth century have specifically provided for option [25] and with a single exception the peace treaties of 1919–1920 consistently followed this practice.[26] Each treaty of

[13] Treaty of Versailles, Art. 79, Annex, par. 1. [14] *Ibid.*, par. 2. [15] *Ibid.*, par. 3.

[16] Fauchille, *op. cit.*, p. 866; Audinet, *op. cit.*, p. 379; Pillaut, "Les questions de nationalité dans les traités de paix de 1919–1920," *Revue de Droit International Privé*, 1921, p. 5.

[17] Text, Supplement to this JOURNAL, Vol. 14, pp. 1 *ff.*

[18] Text, Martens, *op. cit.*, Vol. XII.

[19] Treaty of St. Germain, Art. 70. [20] Treaty of Trianon, Art. 61.

[21] Exceptions were made where *indigénat* had been acquired after a certain date in territories transferred to Czecho-Slovakia and to the Serb-Croat-Slovene State (Treaty of St. Germain, Art. 76, Treaty of Trianon, Art. 62), and to Italy (Treaty of St. Germain, Art. 72).

[22] Fenwick, International Law (1924), pp. 239 *ff.*; Phillipson, *op. cit.*, p. 285.

[23] Boyd *v.* Thayer (1891), 143 U. S. 162.

[24] For diverse views see Willoughby, The American Constitutional System (1904), p. 257; Lawrence, International Law (1923), pp. 92–93; Phillipson, *op. cit.*, p. 38; Oppenheim, International Law (1921), Vol. I, p. 274; Westlake, Collected Papers on International Law (1914), pp. 486–487; and Rivier, *Principes du Droit des Gens* (1896), Vol. II, pp. 438–439.

[25] Oppenheim, *op. cit.*, p. 274. [26] In Alsace-Lorraine. Discussed below, pp. 272–273.

cession usually stipulated the conditions of option and these have varied with different treaties. In certain instances [27] emigration from the ceded territory has been sufficient; [28] in some, [29] a formal declaration has been the only requirement; in others, both declaration and emigration have been necessary; [30] and in still others, not only emigration but also the sale of immovable property has been required. In all cases a time limit was fixed for the fulfillment of the requirements.[31] In most cases this period was made to extend from the date of the exchange of ratifications, [32] but in a few instances it ran from the date of the signature of the treaty.[33]

The treaties of 1919–1920 generally recognized the right of option. The Treaty of Versailles [34] allowed German nationals over eighteen years of age habitually resident in territories assigned to Belgium, Czecho-Slovakia, Poland, Danzig, and Denmark two years within which to opt for German nationality, but required them to transfer their residence to Germany within twelve months after the declaration of option was made. They were, moreover, entitled to retain their immovable property in the transferred territories and were permitted to carry with them their movable property subject to no export or import duties. The Treaty of Neuilly [35] similarly permitted Bulgarian nationals established in territories assigned to the Serb-Croat-Slovene State and to Greece to opt for Bulgarian nationality. The Treaty of Sèvres,[36] as well as the subsequent Treaty of Lausanne,[37] likewise permitted Turkish nationals who *ipso facto* lost their Turkish nationality in territories detached from Turkey to opt for Turkish nationality. The Treaty of St. Germain [38] and the Treaty of Trianon [39] contained similar provisions for option, except that one year instead of two was allowed for making the declaration.

These treaties, while making provision for option, contained a new feature by providing that in certain instances where the nationality of the inhabit-

[27] See Treaty of Paris, December 10, 1898; Treaty of New York, August 4, 1916; Treaty of Guadalupe-Hidalgo, February 19, 1848; Treaty of March 30, 1867, between United States and Russia.

[28] See Treaty of Guadalupe-Hidalgo, February 19, 1848; Treaty of Berne, December 8, 1862; Anglo-French Treaty, April 8, 1904; Convention between Great Britain and Germany, July 1, 1890; Treaty of Paris, December 10, 1898; Treaty of New York, August 4, 1916.

[29] See Treaty of Zurich, November 10, 1859; Treaty of Turin, March 24, 1860; Treaty of Paris, February 2, 1861; Treaty between Austria, Prussia, and Denmark, October 30, 1864; Treaty of Frankfort, May 10, 1871; Treaty of Constantinople, September 29, 1913; Treaty of Athens, November 14, 1913; and the Treaty of Constantinople, March 14, 1914.

[30] See Treaty of Paris, November 20, 1815; Treaty of Constantinople, February 8, 1879; Treaty of Shimonoseki, April 17, 1895; Treaty of Portsmouth, September 5, 1905.

[31] Fauchille, *op. cit.*, pp. 869 *ff.*; Despagnet, *op. cit.*, p. 370.

[32] Phillipson, *op. cit.*, p. 290.

[33] Treaty of Constantinople, September 29, 1913, Treaty of Athens, November 14, 1913, and Treaty of Constantinople, March 14, 1914, contained this provision.

[34] Arts. 37, 85, 91, 106, 113.

[35] Arts. 40, 45.

[36] Art. 124.

[37] Art. 30.

[38] Art. 78.

[39] Art. 63.

ants of transferred territory was not changed *ipso facto*, such persons could opt, not to retain their old nationality, but to select the nationality of the annexing state.[40] While this feature was not unprecedented,[41] as was maintained by some writers,[42] it was exceptional prior to the peace treaties of 1919–1920. Those persons who were permitted to opt for a new nationality included those whose nationality was not changed *ipso facto* by transfer of the sovereignty of the territory, and those who were domiciled outside of annexed territory. The Treaty of Versailles [43] provided that Czecho-Slovaks and Poles who were German nationals habitually resident in Germany could opt for Czecho-Slovak and Polish nationality respectively. This treaty also provided that those persons who were born in the territory restored to Denmark, but who were not habitually resident in this region and who possessed German nationality, could opt for Danish nationality. According to the Treaty of Neuilly,[44] Serb-Croat-Slovenes having Bulgarian nationality and who were established in Bulgaria could opt for Serb-Croat-Slovene nationality. The Treaties of St. Germain [45] and Trianon [46] provided that, with respect to those persons who possessed rights of citizenship in territory forming a part of the former Austro-Hungarian Monarchy, if they differed in race and language from the majority of the population of the state to which the territory was ceded, could opt within six months from the coming into force of the treaty for the state they desired (Austria, Italy, Poland, Roumania, Czecho-Slovakia, or the Serb-Croat-Slovene State), provided a majority of the population of the state selected was of the same race and language as the person exercising the right to opt. The Treaty of Sèvres [47] and the Treaty of Lausanne [48] each made a similar provision with respect to persons resident in territories detatched from Turkey, except that this right was accorded to those differing in race only and not in race and language as in the Treaties of St. Germain and Trianon. This is considered an important feature of the peace treaties because it will permit individuals to become attached to a country to whose population they can easily be assimilated. Difficulties may arise, however, in carrying out this provision, from interpretation and determination of what is meant by "a majority of the same race and language." [49]

As stated above, option was recognized by the treaties following the World War in all cases of changes in territorial sovereignty, with a solitary exception, namely, in Alsace and Lorraine, the two provinces restored to

[40] Audinet, *op. cit.*, p. 383.

[41] The Treaty of Constantinople of March 14, 1914, by which Turkey ceded territory to Serbia, allowed persons born in the ceded territory but who were domiciled in a foreign country, to opt not for their old Turkish nationality, but for the nationality of Serbia the annexing state. For the text of this treaty, see Martens, *op. cit.*, Vol. VIII, Art. 4, p. 643.

[42] Fauchille, *op. cit.*, p. 868; Audinet, *op. cit.*, p. 384.

[43] Arts. 85, 91, 113. [45] Art. 80. [47] Niboyet, *op. cit.*, p. 299.

[44] Art. 40. [46] Art. 64. [48] Art. 32.

[49] Niboyet, *op. cit.*, p. 298; Audinet, *op. cit.*, p. 385.

France by Germany.[50] Those individuals who became French *ipso facto* (*de plein droit*) as a result of the restoration were not allowed to opt for Germany, although Germany has requested that a liberal right of option be permitted.[51] With respect to the Germans residing in Alsace-Lorraine there was no necessity for allowing them to opt for Germany, since they did not *ipso facto* become French but remained German until specially naturalized.

Besides the conditions of option already mentioned, there are certain juridical effects which may be noted, such as the effect of option on the status of married women and minor children. With respect to married women, in the absence of treaty provisions, the general practice, based upon the principle that the nationality of the wife is that of the husband, has opposed the right of married women to opt.[52] The peace treaties of 1919–1920, however, all specifically provide that the option of the husband should include that of the wife.[53] This provision, although it may appear to be an infringement of individual rights, was made principally to preserve family unity.[54]

There have been some treaty provisions with respect to minor children. Some treaties have provided that the period of option for minors should run from the date of the attainment of their majority;[55] sometimes the option of "parents or guardians" has included the children;[56] and again, the option of parents only has determined the status of the minor children. All of the treaties following the peace settlements of the World War provided that children under eighteen years of age were included by the option of their parents.[57] It may be pointed out that some difficulty might here arise, since no provision was made for children under eighteen whose parents might not be living. It is possible that there would be less confusion if the period of option for minors were made to extend from the date when the minor reached his majority.[58]

Changes in territorial sovereignty have not been effected without complications and disagreements as to treaty provisions. The cession of Schleswig-Holstein to Prussia and Austria by Denmark in 1864 was the cause of negotiations as late as 1907. The inhabitants of the ceded territory were allowed to opt for Denmark but were required to withdraw to Danish ter-

[50] Niboyet, *op. cit.*, p. 304.

[51] Comments by the German Delegation on the Conditions of Peace, International Conciliation, October, 1919, p. 1236.

[52] Phillipson, *op. cit.*, pp. 298–299.

[53] Treaty of Versailles, Arts. 37, 85, 91, 106, 113; Treaty of Neuilly, Art. 45; Treaty of Sèvres, Art. 130; Treaty of Lausanne, Art. 36; Treaty of St. Germain, Art. 78; Treaty of Trianon, Art. 63.

[54] Niboyet, *op. cit.*, pp. 297–298.

[55] See Protocol of October 31, 1877 to the Treaty of Paris of August 10, 1877; Treaty of Constantinople, September 29, 1913; Treaty of Athens, November 14, 1913; and the Treaty of Constantinople, March 14, 1914.

[56] Anglo-French Convention, April 8, 1904, and the Treaty of New York, August 4, 1916. [57] See footnote 53. [58] Cogordan, *op. cit.*, p. 398.

ritory. Some of the optants returned to the ceded territory after opting for Denmark. A question arose as to the status of the sons of these optants.[59] Denmark considered that they were Prussians because they were not born on Danish territory, where the law of *jus soli* was applied for determining Danish nationality. Prussia, on the other hand, considered them as Danish subjects since their fathers had opted for Denmark. Consequently there were some 10,000 homeless (*heimatlos*) children in these provinces who, furthermore, could be expelled at the discretion of Prussia.[60] Finally, on January 11, 1907, a convention was signed at Berlin according to which the Prussian Government agreed to confer Prussian nationality upon the children of optants, who applied for it, providing they were domiciled in Prussian territory. Denmark, on her part, agreed to allow those who did not become Prussian subjects to reside freely within her territory.[61] Naturalization of this group was thus placed in the hands of the Prussian authorities, and, while many officials were opposed to granting Prussian nationality to these children on the ground that it would strengthen the Danes against Prussian *kultur*, they, nevertheless, have granted Prussian nationality to several thousand of the former *heimatlos*.[62]

Another instance in which complications and disagreements with respect to option were encountered was in connection with the cession of Alsace-Lorraine to Germany by France in 1871. According to Cogordan no clause of the Treaty of Frankfort gave rise to more difficulties of interpretation than that relating to option permitted to the Alsace-Lorrainers.[63] In the conference at which the treaty was drawn up, the French plenipotentiaries favored following the principle of domicile in preference to that of birth for determining the changes of nationality in these provinces.[64] The Germans would not agree to this principle, and as a consequence a mixed system was adopted, the treaty providing as follows:

> Les sujets français, originaires des territoires cédés, domiciliés actuellement sur ces territoires, qui entendront conserver la nationalité française jouiront jusqu'au 1 d'octobre 1872, et moyennant une déclaration préalable faite à l'autorité compétente, de la faculté de transporter leur domicile en France et de s'y fixer, sans que ce droit puisse être altéré par les lois sur le service militaire, auquel cas la qualité de citoyen français leur sera maintenue.[65]

In spite of the fact that this article clearly related to French subjects *originaires* of the ceded territories and actually domiciled there, it was the

[59] Larson, "Prussianism in North Sleswick," American Historical Review, Vol. 24, pp. 233 *ff.*; De Jessen, *Manuel Historique de la Question du Schleswig*, pp. 230 *ff.*

[60] Fauchille, *op. cit.*, p. 863.

[61] Martens, *op. cit.*, Vol. I, p. 632.

[62] Larson, *op. cit.*, p. 238.

[63] Cogordan, *op. cit.*, p. 358.

[64] *Ibid.*, p. 359; May, *Le Traité de Francfort* (1909), p. 141.

[65] Martens, *Nouveau Recueil Général*, Vol. XIX, Art. II, p. 689.

source of much confusion and disagreement. The French maintained that by virtue of this article the individuals who had been born (*originaires*) in Alsace-Lorraine, but who were not domiciled in these provinces, and the French who were domiciled in Alsace-Lorraine, but who had been born (*originaires*) in other French departments, should be considered French without any formality of option. They also interpreted the word *originaires* in a restricted sense, considering that it applied only to those who had been born in Alsace-Lorraine of parents who were themselves Alsace-Lorrainers. But on putting the question to the German Government, the latter considered that it included all persons who had been born in the ceded provinces regardless of the nationality of their parents.[66] Furthermore, the additional convention of Frankfort did not coincide with the French interpretation, since it required that the *originaires* who were domiciled outside the ceded provinces would have to opt in order to conserve French nationality.[67] As a result, those persons who had to opt in order to retain French nationality were those who had been born in Alsace-Lorraine, regardless of their domicile at the time these provinces were ceded. Although this provision was objectionable to France, they conformed to it; so that both France and Germany considered as Germans all those who had been born in Alsace-Lorraine no matter where they resided, if they had not regularly opted.[68] Another serious difficulty developed regarding the inhabitants of the ceded provinces who had been born in other French departments. The French did not consider that their nationality had been affected by the cession. The German authorities, however, took the opposite view and on the 7th of March, 1872, an ordinance was issued in Alsace-Lorraine requiring this class of individuals to transfer their domicile to France if they wished to retain French nationality.[69]

To sum up, then, the conditions which were imposed upon the inhabitants of Alsace-Lorraine were two: declaration of option, and emigration. The individuals affected were of three classes: (1) *originaires* who were domiciled in the provinces (as provided by Article II of the Treaty of Frankfort of May 10, 1871), (2) *originaires* who were not domiciled in the ceded provinces (according to the additional convention of December 11, 1871), and (3) those individuals who were domiciled in Alsace-Lorraine but who were not *originaires* of these provinces (according to the interpretation by the German authorities).[70] To retain French nationality, the individuals of the first class had to opt and emigrate; those of the second had to make only a declaration of option; and those of the third class remained French from the French point of view, but became German from the German point of view unless they transferred their domicile to France,[71] no declaration of option being required. The period for making the required declarations and emigration

[66] Cogordan, *op. cit.*, pp. 360–361; May, *op. cit.*, p. 149.
[67] Martens, *op. cit.*, Vol. XX, Art. I, p. 848; May, *op. cit.*, p. 181.
[68] Cogordan, *op. cit.*, p. 361. [69] *Ibid.*, p. 362. [70] *Ibid.*, p. 364. [71] *Ibid.*

was until October 1, 1872, for those who were domiciled in the ceded provinces, with an additional year for those domiciled elsewhere.[72]

Another controversy which provoked many conflicts was the question of the status of minor children.[73] The French plenipotentiaries at the conference at which the treaty was negotiated wanted the period of option to be reserved for minors and to be extended so that they could opt when they became of age. The German delegates did not agree with this view, but favored the minors' opting with the assistance of their legal representatives. In applying these diverse views, the conflicting interpretations which developed with reference to particular cases fell into four groups. The first had to do with minors who were born in Alsace-Lorraine of Alsace-Lorraine parents. Here the French Government took the position that it was sufficient for the minor to opt with the authorization of his father or guardian and to emigrate before the period of option expired. From the German point of view it was first necessary that the legal representative himself conserve the status of French nationality. If the guardian was the legal representative, he could not opt for the minor without the authorization of the family attorney. The father only could opt for his children without any advice. If the father opted for himself and not for his children they would be French from the German point of view, but from the French point of view they would be considered as Germans. The second group, about which there was controversy, included minors born outside the ceded territories of Alsace-Lorraine parents. The French authorities considered that they remained French because they were not born (*originaires*) in Alsace-Lorraine. Germany, on the other hand, regarded them as German subjects unless their parents had fulfilled the conditions necessary to retain French nationality. The third group over which there was difficulty embraced those who were born in Alsace-Lorraine of parents who had not been born there. From the French standpoint these children could retain French nationality by making a declaration of option and emigrating within the required period. From the German point of view several difficulties were presented. If the parents of the minor child lived in Alsace-Lorraine they became German subjects regardless of the fact that they had not been born there. In this case the child followed the personal status of his parents and his nationality would depend upon the nationality of his parents rather than upon the formality of option. On the other hand, if the minor was an orphan, it was necessary that his guardian who opted for him be French in order to validate the option. The fourth group, concerning which there was a difference of interpretation, included minors who were born outside Alsace-Lorraine of parents who were not Alsace-Lorrainers but who were domiciled in Alsace-Lorraine at the time of the annexation. The French authorities did not consider that they were affected by the cession at all.

[72] Cogordan, *op. cit.*, p. 365; May, *op. cit.*, p. 146. [73] *Ibid.* pp. 371 *ff.*

The German authorities, however, considered them as German subjects if they were not domiciled in Alsace-Lorraine at the time the provinces were annexed.

In consequence of these divergencies of interpretation the nationality of a great number of individuals could not be exactly determined, and the problem of irregular options and contested nationalities arose. The most difficult condition for the Alsace-Lorrainers to fulfill in order to conserve French nationality was the transfer of domicile from the country where their interests were so strongly fixed.[74] A great many simply made the declaration and then failed to emigrate in the specified time. Thus the option was not valid. The German authorities permitted those who had made only the declaration to withdraw it, and, until they had cancelled the declaration, they incurred the forfeiture of certain civil rights, in spite of the fact that they were considered German subjects. There were others who, after having transferred their domicile, returned to Alsace-Lorraine. This was often interpreted by the German authorities as a presumption that the option had not been serious and that it was annulled thereby. A great many options were consequently annulled for default of transfer of domicile. As many as 110,240 options are said to have been thus annulled by the German authorities.[75] Finally, in 1880, after considerable controversy, the German government appointed a commission to determine the nationality of those whose nationality was questioned and to decide whether they belonged to Germany or to France. This commission recognized 5,000 Alsace-Lorrainers as French citizens. The government of Alsace-Lorraine, nevertheless, informed them that regardless of this recognition they were subject to the local regulations applicable to foreigners. This was followed by a detailed report to the French authorities in 1884 which was the last important official document relating to options in Alsace-Lorraine.[76]

Several problems of paramount importance are brought to the front in a consideration of the effect of changes of sovereignty on nationality. Conflicts of nationality should be avoided as well as the multiplication of the *heimatlos* group. The principles upon which changes of nationality are based ought not to conflict with the general principles observed for the determination of nationality in general. It may be pointed out in this connection that the treaties of 1919–1920 recognized a principle for the determination of nationality which will have a much broader application than to cessions of territory only. The principle of *jus soli* was adopted by the treaties[77] between the Allied and Associated Powers and Poland, Czecho-Slovakia, Roumania, Bulgaria, and the Serb-Croat-Slovene State, whereby these states all agreed to recognize as their nationals *jure soli* all persons born in their territory who were not born nationals of another state.

[74] Hazen, Alsace-Lorraine under German Rule (1917), p. 97.
[75] Cogordan, *op. cit.*, p. 385. [76] *Ibid.*, pp. 389 *ff.* [77] See Art. 6 of each treaty.

This principle seems to be in harmony with the modern tendency [78] to adopt the principle of *jus soli* for the determination of nationality of origin and may be considered a step toward the establishment of a uniform nationality law. Although nationality belongs to the exclusive domain of internal legislation, its effects and importance appear internationally, and precaution should be taken, therefore, not only to eradicate but also to prevent all possible sources of friction in international relationships which are traceable to this complex problem.

[78] *Publications de la Cour Permanente de Justice Internationale, Série C, No. 2, Deuxième Session Extraordinaire*, pp. 66 *ff*.

HOW TO FIGHT SAVAGE TRIBES

By Elbridge Colby

Captain, United States Army

In the April, 1926 number of this Journal, Professor Quincy Wright remarks, apropos of the Damascus bombardment:

> Does international law require the application of laws of war to people of a different civilization? The ancient Israelites are said to have denied the usual war restrictions to certain tribes against which they were sworn enemies, the ancient Greeks considered the rules of war recognized among Hellenes inapplicable to barbarians, and medieval Christian civilization took a similar attitude toward war with the infidel. An English writer in 1906 draws attention to "the peculiarly barbarous type of warfare which civilized powers wage against tribes of inferior civilization. When I contemplate," he adds, "such modern heroes as Gordon, and Kitchener, and Roberts, I find them in alliance with slave dealers or Mandarins, or cutting down fruit trees, burning farms, concentrating women and children, protecting military trains with prisoners, bribing other prisoners to fight against their fellow countrymen. These are performances which seem to take us back to the bad old times. What a terrible tale will the recording angel have to note against England and Germany in South Africa, against France in Madagascar and Tonquin, against the United States in the Philippines, against Spain in Cuba, against the Dutch in the East Indies, against the Belgians in the Congo State." Possibly the emphasis, in most accounts of the recent bombardment of Damascus, upon the fact that relatively slight damage was done to Europeans and Americans indicates the existence of this distinction in the moral sense of western communities.

The passage is, it is true, torn from its context. But it at least illustrates —however Professor Wright may deplore the fact—one matter which must be faced.

The distinction is existent. It is based on a difference in methods of waging war and on different doctrines of decency in war. When combatants and non-combatants are practically identical among a people, and savage or semi-savage peoples take advantage of this identity to effect ruses, surprises, and massacres on the "regular" enemies, commanders must attack their problems in entirely different ways from those in which they proceed against Western peoples. When a war is between "regular" troops and what are termed "irregular" troops the mind must approach differently all matters of strategy and tactics, and, necessarily also, matters of rules of war.

This view has been expressed prominently enough not to be overlooked. Said Professor Jesse S. Reeves at Williamstown, Mass., August 2, 1923:

> International law is not applicable to uncivilized peoples and could have no influence upon them. It is merely a body of rules and customs that have grown up among nations more or less similar for use among themselves.

Says Colonel J. F. C. Fuller of the British Army:[1]

> In small wars against uncivilized nations, the form of warfare to be adopted must tone with the shade of culture existing in the land, by which I mean that, against peoples possessing a low civilization, war must be more brutal in type.

Said an argument before the Court of Claims of the United States:[2]

> A savage tribe like the Bannocks are incapable of waging war in the sense of international law. Such barbarous and loosely organized bands are incapable of attaining a status of belligerency. The least discriminating sense apprehends a difference between war against nations and military operations against gangs of pirates, bandits, and marauders.

Says the official British instruction book on the subject:[3]

> It must be emphasized that the rules of International Law apply only to warfare between civilized nations, where both parties understand them and are prepared to carry them out. They do not apply in wars with uncivilized States and tribes, where their place is taken by the descretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case.

This is the experience of the red-coated army that has fought perhaps in more corners of the globe with more uncivilized and savage peoples than any other military organization in modern times. International law, as we know it today, is essentially a Christian doctrine. It arose in full power in the era of Christian national states. Grotius and Vattel were thinking of applying Christian doctrines to organized warfare, not far from being analogous to the chivalrous rules handed down from the days of armored knights. The crossbow, for example, might have been placed under interdict "as a barbarous weapon unfit for Christian warfare" by a council of the Church held under Pope Innocent II in 1139, and yet Richard the Lion Hearted freely and unperturbedly used it against the Saracens on crusade, and his practice was followed by Philip Augustus of France. In his History of the Law of Nations, Ward[4] instances the difference between Turkish common practice of putting all prisoners in chains and the complaints of the Spanish Ambassadors at Vervins against such treatment of Spaniards. Ward likewise em-

[1] Fuller, The Reformation of War, p. 191.

[2] Marks *v.* U. S., 28 Ct. Cl. 147

[3] Manual of Military Law, 1914, p. 235, par. 7. A similar distinction is implicit in Leiber's Instructions, par. 24, G. O. 100, 1863; Moore, Digest, VII, 173, regarding "barbarous armies."

[4] Law of Nations, I, 145, citing *Lettre du 26 Fev. au Roi, 1598, Duc de Guise. Mem. de Bell. et Sill.*

phasizes this same difference in conception between laws of war in the early years of the New World. He says:[5]

> When the New World was opened to the spirit and adventure of the Old, it was reasonable to expect what was found: new laws and customs, as well as a new people and language. But on that very account it was not reasonable to expect that the intercourse between the Spaniards and the Mexicans should be governed by the same customs as the intercourse of Nations in Europe: nor, if the latter sacrificed their prisoners to their gods, could the former fairly complain of it as a breach of the Law of Nations. Yet to the astonishment and horror of every thinking and good mind, this was one of the charges on which the innocent and unfortunate monarch of Peru was put to death by the ruthless Pizarro.

In that particular instance, Atuhalpa was tried by a Spanish court of justice, and punished for what the Europeans regarded as an atrocity, though it was a normal incident to warfare among the Mexican people. If one be angered by the death of friends, it is always possible to pick the most severe law under which to punish the offender. Witness the following little conversation, taken by Ward out of that agreeable chronicler, Matthew of Paris:[6]

> "In the name of the God you worship," said Saladin, to the prince of Antioch, his prisoner, worn down and emaciated with hunger and with chains, "what would he command you to do with me, if I were in your power, as you are in mine?"
>
> "He would counsel me," returned the fearless prince, "to have you beheaded on the spot; but as you are a Sovereign, like myself, though an infidel; I myself ought to be your executioner."
>
> "Your own mouth has pronounced your doom," said the Saracen, drawing forth his sword.

Generalities and isolated instances aside, the real crux of the matter of warfare between civilized and uncivilized peoples almost invariably turns out to be a difference in fact as well as a difference in law. In fact, among savages, war includes everyone. There is no distinction between combatants and non-combatants. Whole tribes go on campaign. This is the primitive method of applying armed force. The modern and so-called "civilized" method attempts to make a distinction between combatants and non-combatants. The battle may be waged on the field of conflict. But combatants are entitled to the rights of prisoners of war. Non-combatants are entitled to protection against unnecessary molestation, and the "necessity" of molestation is a subject of intricate provisions and endless controversy. Yet, among nations recognizing and practising international laws of civilized war, the distinction between the two is basic, between those authorized combatants and the unauthorized and unofficial by-standers.

[5] *Ibid.*, I, 136.

[6] *Ibid.*, II, 137, citing Matt. Paris, II (Rolls ser.), 813.

This distinction has been increasing in emphasis since the eighteenth century, when Vattel remarked:[7]

> Aujourd'hui, la guerre se fait par les troupes réglées; le peuple, les paysans, les bourgeois, ne s'en mêlent point, et, pour l'ordinaire, ils n'ont rien à craindre du fer de l'ennemi.

There is one phrase in this statement, however, which is very important indeed. So important it is, in fact, that it has often been overlooked, as important qualifying details are, to the distortion of the whole statement. The idea is sound, provided the people, the peasants, and the city folk, do not intrude themselves (*ne s'en mêlent point*) into military matters.

On May 1, 1865, Uruguay, Brazil and Argentine combined to make war "not against the people of Paraguay but against the government"[8] and that in the course of that terrible conflict almost the whole of the nation of Paraguay was obliterated. But look further and you will also find that the whole people acted as a part of the army, and that even women were employed to carry on the operations by serving practically as beasts of burden for the field forces.[9] In other words, the war was not a war in which "the people did not interfere" but one in which practically every person was a combatant. Such a war is what is spoken of as "guerilla warfare" when irregulars, usually not uniformed and usually mingled with the residents, harass and attack and slaughter regular troops. In such a war "where a whole population engages in warfare, the distinction between combatant and non-combatant vanishes."[10] Note also that when Brigadier-General John Coffee and his Tennessee troops conquered the Creek Indians in Mississippi Territory, November 3, 1813, at Tallussahatchie, "both men and women struggled to the last . . . without asking quarter" and "not one would desert the field, but men, women, and children perished together."[11] When the distinction vanishes in fact, it likewise vanishes in law. When the distinction is not readily apparent to a field commander, that commander is perfectly justifiable in ceasing to observe it, for the safety of his own troops is his paramount consideration.

A somewhat similar circumstance occurred in South Africa. Entering the territory of the South African Republic in 1900, General Buller proclaimed:[12] "Her Majesty does not make war on individuals. . . . The quarrel England has is with the Government, not with the people, of the Transvaal." The struggle dragged on. Resistance broke down, in organized form. Scattered resistance continued. It was being fostered and furthered by the civil

[7] *Droit des Gens*, Bk. III, Ch. VIII, § 147. See also Rousseau, *Contrat Social*, Bk. I, Ch. IV, and letter of Talleyrand to the Emperor of 1806, cited in Bray, *Occupation Militaire*, pp. 177–178.

[8] British and Foreign State Papers, Vol. LV., p. 83, Art. 7.

[9] G. Thompson, War in Paraguay, p. 342.

[10] Bordwell, Law of War, p. 152.

[11] Rowland, Andrew Jackson's Campaign Against the British, p. 159.

[12] Oppenheim, International Law, 2nd ed., Vol. II, p. 65.

population. The citizens turned soldier or farmer as occasion seemed to demand. Stringent methods were necessary. Formal hostilities had become guerilla forays. So Kitchener started deliberately on a policy of obliterating the sources of the resistance and the points of its support. His burning and destruction of Boer farms has been instanced numerous times, and was vigorously so assailed at the time [13] as indecent brutality. Yet those who understand the task imposed upon the British Army must realize that such was the only available course, and cannot actually condemn such suppression of such irregular resistance as contrary to international law.

In 1532 Franciscus of Victoria contended it proper at times to exterminate "all who can bear arms" and added that "in a war with Christians this would not be allowable." [14]

Yet, the distinction is not one of Christianity and paganism. It is a distinction of warfare. Against elusive savage or semisavage people, and against tribal units which wage war as complete tribes, the method must be, as the British Colonel Fuller has said, "more brutal." A concrete illustration of overwhelming, strange, and devastating force, may break down resistance completely and make for an early peace. Speaking of aërial operations, the United States Army doctrine states:[15]

> The effect of bombing . . . is generally very great upon the morale of an irregular enemy. The objective of irregular operations . . . may be the capital of the people, their main source of supply, their prominent leaders, or, if a fanatical people, the seat of their religion.

And the British doctrine is obviously somewhat the same, for a well-known Wing Commander is quoted as saying:[16]

> One object must be selected—preferably the most inaccessible village of the most prominent tribe which it is desired to punish. . . . The attack with bombs and machine guns must be relentless and unremitting and carried on continuously by day and night, on horses, inhabitants, crops, and cattle.

Nor is this method of waging war merely a matter of doctrine. In Afghanistan, in May, 1919, explosives dropped from planes "inflicted heavy losses on civil population and army" in and about Jalalabad.[17] In the same year in October intensive aërial bombardments were undertaken against the recalcitrant tribes of Tochi Wazirs and Mahsuds.[18] All of this was simply a more modernized and more effective version of prior British bombardments with field artillery against native Asian villages, a casual type of incident against native tribes in the story of British colonial enterprise and mastery.[19]

[13] F. Y. T. Fuller, A West Pointer with the Boers, pp. 202–203.

[14] *On the Law of War*, §48. [15] Training Regulations, No. 15–70, U. S. Army, par. 24.

[16] In J. F. C. Fuller, The Reformation of War, p. 208.

[17] Papers Regarding Hostilities with Afghanistan. Parliamentary Acts and Papers. East India, 1919, Col. xxxvii. [18] L. F. R. Williams, India in 1920. p. 7.

[19] C. E. Callwell, Stray Recollections, I, 133–134.

However, all of this is somewhat generalized. It has to do with the larger objectives of war, rather than with incidents. In the more concrete detail, we find many incidents in history to support the British theory that when natives go to war, they do not observe the individual decencies of civilized regular soldiers. And here on the American continent we have ample example of what might be expected from conflict with such persons. The long list of Indian wars in which the troopers of the United States have defended and pushed westwards the frontiers of America bear eloquent testimony to the unified tribal action in war, and to the almost universal brutality of the red-skinned fighters. With these, there can be little thought of international law. The fact was brought home very plainly, and discussed in official papers, during the War of 1812, in which England attempted to utilize the aid of redskin to harass and harm the Americans. This unnatural alliance of redskins with redcoat caused the deepest perturbation on the part of the United States. When General Hull entered Canada he announced on July 13, 1812, that he would take strenuous counter-measures. He said:[20]

> If the barbarous and savage policy of Great Britain be pursued, and the savages are let loose to murder our citizens and butcher our women and children, this war will be a war of extermination. . . . If the dictates of reason, duty, justice and humanity, cannot prevent the employment of a force, which respects no rights and knows no wrong, it will be prevented by a severe and relentless system of retaliation.

That these were not needless alarms, and empty threats, but rather the sound forebodings of an American who knew the redskin as he was and as he waged war, is attested by the report of a Major P. L. Chambers of the British forces, to Colonel Proctor, in August of the same year, when he entered United States territory to receive a surrender:[21]

> In conformity with my Instructions, I assured the Inhabitants of the Effectual Protection of His Majesty's Government. But it is with extreme mortification I feel myself compelled to state, that notwithstanding every effort on my Part, to insure it to them, so strong was the disposition on the Part of the Indians in particular the Wyandotts, to Pillage Ravage and destroy, that I could not succeed, scarcely a House in that Settlement [River au Raisons] having escaped Pillage. Indeed it was one Universal scene of desolation.

It is really beside the point here to go into the controversy as to whether measures of retaliation were justifiable[22] and how far the British violated international law in employing the services of savage tribes in a regular war.[23]

[20] British Documents of the Canadian War of 1812. Champlain Society Publications. No. XIII (Toronto, 1920), Vol. I, pp. 356–357.

[21] *Ibid.*, Vol. I, pp. 498–499.

[22] *Ibid.*, Vol. I, p. 373.

[23] *Ibid.*, Vol. I, pp. 356–357; Rules of Land Warfare, U. S. Army, 1914, Art. 41; Bonfils, 8th ed. (Fauchille), sec. 1083; Morgan, War Book of the German General Staff, 1915, p. 87; Bordwell, Law of War, p. 140; Garner, International Law and the World War, Vol. I, p. 292; Oppenheim, International Law, 3rd ed., Vol. II, p. 108; as cited by Q. Wright in this JOURNAL, April, 1926, Vol. XX, p. 267.

The real essence of the matter is that devastation and annihilation is the principal method of warfare that savage tribes know. Excessive humanitarian ideas should not prevent harshness against those who use harsh methods, for in being overkind to one's enemies, a commander is simply being unkind to his own people. As James Monroe remarked, when he declared General Harrison acted properly in 1813 in burning Indian huts and homes:[24]

> This species of warfare has been invariably pursued by every nation engaged in war with the Indians on the American continent.

The fact simply is that when a tribe on the war-path measures its victories by the number of houses burned and the number of foes, combatant or non-combatant, cut up, you must use a different method of warfare. When Oriental peoples are accustomed to pillaging and being pillaged, accustomed to torturing and flaying alive distinguished prisoners,[25] you are dealing with opponents to whom the laws of war mean nothing, who, as General Hull said of the American Indians, "respect no rights and know no wrong." Against such it is not only perfectly proper, it is even necessary, to take rigorous measures. These are not those "regular troops" of whom Vattel spoke, waging a conflict in which people, peasants and bourgeois, do not mix. Against such, who neither understand nor are ready to apply the rules of international law, as the British Manual says, it is perfectly correct and indeed absolutely essential to trust simply "to the discretion of the commander."

One hundred and thirty-odd years ago, Ward remarked:[26]

> Where they professed to observe a Code, so directly the opposite of ours, . . . then, indeed, I could conceive we might act towards them as towards enemies, whose disposition it was, like beasts, to prey upon us; but even then I do not perceive the fairness of considering them as amenable to the laws we chose to pursue or as punishable for breaches of those laws.

In other words, he would object to the formal trial and punishment of a Mexican for a "crime" under Spanish law, which was a perfectly normal and regular procedure under Mexican law. Nor does it do any good to write Latin treatises on the right of the Spaniards to travel and trade in Indian country under theological or legal doctrines, as did Franciscus of Victoria. It would be but Latin to the Indians. In other words, it would not be proper to institute formal recriminations and "reprisals" against enemy forces for alleged misbehavior on the battlefield. Such steps would simply not be understood by the persons at whom they were directed. They might be felt; but they would not be understood.

It appears entirely fallacious to assume that those less humane methods of

[24] Niles Weekly Register, March 18, 1815. Vol. VIII, pp. 35–36.
[25] J. P. Ferrier, Caravan Journeys, pp. 14, 81.
[26] Ward, Law of Nations, Vol. I, p. xi.

waging war which are commonly employed against savage tribes in Asia and in Africa today, as they were in previous ages against "infidel" Saracens and "wild" American Indians, are merely extensions and applications of the doctrine of retaliation or reprisal. The purpose of a reprisal is to inflict a cruel and unnatural punishment for a cruel and unnatural act. It is meant as a specific lesson for a specific misdeed. It is like that airplane bombing of Frieburg which Mr. Holland in 1917 said was justifiable, even though "deliberately intended to result in injury to the property and persons of civilian inhabitants," because it was deliberately and publicly done "with the practical object of inducing the enemy to abstain in the future."[27]

The doctrine of reprisal permits a temporary departure from the normal law as a formal mode of war-time punishment.

But if the German used poison gas at Ypres in 1915, could you call the constant use of gas thereafter by the Allies simply a reprisal? No! It was not a temporary departure. It was a different mode of fighting. Even though continued departures from the laws of war are only of such character as those of your foe, you cannot call them "reprisals." You are really fighting another kind of war.

The important thing is to keep one's head, and for the commander to exercise real discretion, as it has been intrusted to him, he could do no better than to follow the advice of Baty, who says:[28]

> It is not enough to justify one army in resorting to these measures that instances of the enemy's troops having done so on particular occasions, are alleged to have occurred. . . . There are some infringements which can never be met with reprisals in kind. *Noblesse oblige*, and a self-respecting commander will not follow the example of an antagonist, should that example unfortunately be set, in reducing a civilized army to the rank of a band of massacring savages.

It is well to remind ourselves of the disastrous effects of even slight loosening of the bonds of restraint, as when the Allied troops entered Pekin in 1900 and looted for "souvenirs" without apparent restraint of any effective sort, in spite of partial efforts in some quarters to hold the troops in check.[29] Rules against indiscriminate looting and needless barbarity promote discipline and make for effective and necessary control of one's own forces. It was not because the Chinese were Orientals of another civilization, or because their civilization was really advanced—though different—that American officers gave strict orders against theft, and tried to enforce them to some extent. It was really because of the internal necessity for military discipline and control, as well as an innate sense of decency.[30]

[27] Holland, Letters upon War and Neutrality, 3rd ed., p. 123. See also Moore, Digest, VII, 207; and Vattel, Liv. III, Sec. 141–142.

[28] T. Baty, International Law in South Africa, pp. 85–86.

[29] Prussian Year Book, quoted in N. Y. *Tribune*, March 25, 1923.

[30] See Colby, E., Military Value of the Laws of War, in 15 Georgetown Law Journal 24 (November, 1926).

A finer example is found in the attitude of the soldiers of the Mikado entering China in the war between those two nations in the 1890's. Although the Japanese considered the Chinese a backward and uncivilized people who might not respect the modern conventions and customs of international law, they nevertheless determined to abide by those rules themselves and attached distinguished Japanese publicists and scholars in this branch of learning to each of their armies in the field.[31]

It is good to be decent. It is good to use proper discretion. It is good to observe the decencies of international law. But it is a fact that against uncivilized people who do not know international law and do not observe it, and would take advantage of one who did, there must be something else. The "something else" should not be a relaxation of all bonds of restraint. But it should be clear understanding that this is a different kind of war, this which is waged by native tribes, than that which might be waged between advanced nations of western culture. Ferocity and ruthlessness are not essential; but it is essential to recognize the different character of the people and their usual lack of discrimination between combatants and non-combatants, in their own as well as in enemy personnel. To a Frenchman, a shell striking Rheims Cathedral—signal station thereon or not, it makes no difference—or a bomb exploding on a railroad train—military men therein or not, it makes no difference—is a lawless act of the enemy which infuriates the temperamental soul and arouses wrath and gives a fine incident for overseas propaganda. To a fanatical savage, a bomb dropped out of the sky on the sacred temple of his omnipotent God is a sign and a symbol that that God has withdrawn his favor. A shell smashing into a putative inaccessible village stronghold is an indication of the relentless energy and superior skill of the well-equipped civilized foe. Instead of merely rousing his wrath, these acts are much more likely to make him raise his hands in surrender. If a few "non-combatants"—if there be any such in native folk of this character—are killed, the loss of life is probably far less than might have been sustained in prolonged operations of a more polite character. The inhuman act thus becomes actually humane, for it shortens the conflict and prevents the shedding of more excessive quantities of blood.

These things should be recalled when "civilized" troops make war on "uncivilized" peoples. There is a difference in effect, as well as a difference in conception of warfare. Of this difference the commander may be well aware. Strictly speaking, and in a fine legal sense, he is not bound to observe the precepts of international law against any nation that is not a cosigner of the conventions covering any particular point in question. Strictly speaking, the gas warfare treaty signed not so long since in Washington has never been ratified by France and is inoperative as a ban on poisonous and toxic gases until all signatories ratify and exchange ratifications. But it is to be noticed that the United States Army within six months put that treaty

[31] N. Ariga, La Guerre Sino-Japonaise, pp. xiii, 9.

into effect and has limited instruction and training and preparation of its own troops to "defensive chemical warfare" and the use of mere smoke screens and non-toxic gases. The strictly legal point of view is not the only point of view. The discretion and the decency of the commander are also factors. The really controlling element in the handling of a field force is economy. Economy of effort, economy of force, maintained by a well-knit and well-disciplined army directed toward the most direct and proper attainment of the end in view—these are the precepts by which the commander will govern his actions. Bearing these things in mind, he will use against uncivilized peoples, as the British Manual says, "the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case."

EDITORIAL COMMENT

CHINA'S TERMINATION OF UNEQUAL TREATIES

China has for many years sought to modify the treaty restrictions on territorial jurisdiction and custom rights imposed by the Powers. Recently, this aspiration of China has grown almost to the proportion of a national revolt against the so-called "unequal treaties." Something in the nature of a test case has been made of the Sino-Belgian Treaty of November 2, 1865. By this treaty, China granted to Belgium extraterritorial jurisdiction in China and also the privileges of a tariff schedule of imports and exports and certain commercial regulations. This treaty was an aftermath of the coercive war of 1857 and its provisions followed generally the treaties which that war compelled China to accept. Like many treaties of this character and time, this treaty was not limited to a definite period and contained no provision for its termination or modification except in Article 46, which provided as follows (translation):

> Should the Government of His Majesty the King of the Belgians judge it necessary in the future to modify certain clauses of the present treaty, it shall be free to open negotiations to this end after an interval of ten years from the date of the exchange of ratifications; but six months before the expiration of the ten year period, it must officially inform the Government of His Majesty the Emperor of China of its intention to make such modifications and in what they will consist. In the absence of this official announcement the treaty shall remain in force without change for a new term of ten years and so on from ten years to ten years.

This treaty has remained in its original text, Belgium having found no occasion to request a revision under Article 46. Under the pressure of the Nationalist movement in China, the Chinese Government on April 16, 1926, informed the Belgian Government that it desired to have the treaty of 1865 revised. The Chinese note stated:

> The aforesaid treaty, which still regulates the commercial relations between the two countries, was concluded as long as sixty years ago. During the long period which has elapsed since its conclusion so many momentous political, social and commercial changes have taken place in both countries that, taking all circumstances into consideration, it is not only desirable but also essential to the mutual interest of both parties concerned, to have the said treaty revised and replaced by a new one to be mutually agreed upon.
>
> As conditions and circumstances in human society are constantly changing, it is manifestly impossible to have any treaty which can indefinitely remain good for all times without modification. International agreements, particularly treaties of commerce and navigation are, as a matter of international practice, always subject to more or less

> frequent revisions, in accordance with the nature and circumstances of each case, even in the absence of any express provision to that effect, so that, necessary readjustments may be effected from time to time, to the best advantage of the contracting parties. With the view just expressed above the Chinese Government is glad to note that the Belgian Government is in full accord, as in its reply of September 4, 1925 to the Chinese note of June 24, 1925, the Belgian Government expressed its readiness to consider China's proposal for the modification of her existing treaties.
>
> With reference to the particular treaty now under discussion it is clearly indicated in Article XLVI thereof that the treaty is to run for periods of ten years each, at the end of which revisions may be undertaken. The said treaty was concluded on November 2, 1865 but came into force upon the exchange of ratifications thereof on October 27, 1866. Therefore, on that day of this year, the treaty comes to the end of another decennial period when it could be revised. Accordingly, in pursuance of the provisions of said Article XLVI, the Chinese Government has the honor to inform the Belgian Government that it is the intention of the Chinese Government to have the aforesaid Treaty of Amity, Commerce and Navigation of November 2, 1865 revised and that, therefore, upon the expiration of the present decennial period on October 27 of this year all the provisions thereof, as well as the Tariff Schedule of Imports and Exports, and the Commercial Regulations appended thereto, will thereupon be terminated, and that new agreements will have to be made to take the place of the old ones.

The Chinese Government added the intimation that the proposed treaty should be concluded on the basis of "equality and reciprocity."

The Belgian Minister at Peking immediately replied on April 27, 1926, calling attention to the fact that Article 46 gave "to the Belgian Government alone the right to invoke under certain conditions the revision of the clauses which it judged useful to be modified." The Belgian Government, nevertheless, was in principle disposed to undertake "eventually" a revision of the treaty, but indicated that this should be postponed until the conclusions of the Customs Conference and the Extraterritoriality Commission had been made known.

In the diplomatic exchanges which followed, China declined to agree to a postponement of the negotiations for a new treaty as suggested by Belgium, and expressed a desire that the new treaty be concluded before the close of the decennial period on October 27 next. China added that if a new treaty could not be completed before that date, she would consider the possibility of a provisional *modus vivendi*.

While both parties reserved their original points of view, they undertook to reach an immediate agreement on a *modus vivendi* to take effect on October 27, and continue until a new treaty was negotiated. Without going into the details of the proposals and counter-proposals of the diplomatic correspondence, it may be said that, broadly speaking, China desired the *modus* to place the parties after October 27 on a basis of "equality and reciprocity," while Belgium desired to retain most-favored-nation treatment in China.

China eventually agreed to *reciprocal* most-favored-nation treatment, on condition that a new treaty be negotiated within the next six months to replace the treaty of 1865. Belgium, however, desired to have this *modus* renewable at the request of either party for six month periods without limit. The countries were unable to agree upon this point of time and so the negotiations for a *modus* came to an end in November, 1926.

China felt that if the parties earnestly wished to have a new treaty, it could be easily negotiated before a definite date, considering the equal treaties already concluded with Germany, Austria, Finland, Chile and other countries which might serve as models. The treaty with Austria was ratified in June last and is the latest "equal" treaty negotiated with a Western Power. China also felt that the Belgian suggestion contemplated the indefinite continuance of the *modus* on one pretext or another without the conclusion of a new treaty which China was anxious to negotiate promptly. The fact is that the proposed *modus* gave Belgium practically all the rights which she enjoyed under the 1865 treaty, and she lost nothing and China gained nothing by this plan. Belgium, on the other hand, apparently feared that conditions might intervene, which would leave her without either a treaty or a *modus* if a definite date were fixed. She also seemed to feel that she should first await the results of the work of the Customs Conference and the Extraterritoriality Commission, since she was participating in their deliberations.

The negotiations for a *modus* terminated on November 5, 1926, when the Belgian Government declined the last Chinese proposal for the reasons stated and added that she felt impelled (as she had several times hinted theretofore) to take the question of the interpretation of Article XLVI to the International Court of Justice, and suggested that they agree upon the terms of a *compromis*.

In its reply of November 6, 1926, the Chinese Government regretted the failure of the negotiations for a *modus* over the point of setting a definite time when the new treaty would be concluded, which China regarded "as a proof of the earnestness of both governments in their undertaking to conclude a new treaty within a reasonable period."

The Chinese Government then gave notice of the formal termination of the 1865 treaty as of October 27, as follows:

> In the face of the position now taken by the Belgian Government, the Chinese Government felt that there was no other course open to them but to declare that the Sino-Belgian Treaty of 1865 was terminated. Accordingly, a Presidential Mandate, an English translation of which is herewith enclosed, has been issued to that effect with the instruction that negotiations for the conclusion of a new treaty be started with Belgium as soon as possible on the basis of equality and mutual respect for territorial sovereignty. It will be noted, however, that in the meantime the local authorities are ordered to extend full and due protection to the Belgian Legation, consulates, nationals, products and ships in China

in accordance with the rules of international law and usage, and the Ministries concerned are ordered to propose, in conformity with international practice, arrangements for their favorable treatment and submit these for consideration, approval and enforcement.

On the same day the Chinese Government issued a statement reviewing the negotiations and declaring its position in part as follows:

> On the other hand, it hardly need be emphasized, that no nation mindful of its destiny and conscious of its self-respect, can be fettered forever by treaties which shackle its free and natural development and which are repugnant to the best traditions of international intercourse. Fruitful source of misunderstanding and conflict, they are in their very nature bound to come to an end sooner or later. To endeavor to preserve them in the face of radically changed conditions and against the progress of modern international thought and life is to forget history and its teachings. It is to remove the injustice and danger of such treaties that Article 19 of the Covenant of the League of Nations expressly provides for the possibility of their revision from time to time.
>
> The general right of revision being admitted, the right of both parties to a treaty to terminate it by notice, where it contains a definite clause for revision at stated intervals, is all the more to be recognized. It would be neither fair nor equitable to claim that such right appertains to only one of the two parties. If, as contended by the Belgian Government, Article 46 of the treaty of 1865 is to be construed as giving solely to the Belgian Government the right to revise the treaty, then such a provision would in itself constitute one of the unilateral and unjust privileges against which the Chinese Government protest and which is manifestly incompatible with the spirit of a treaty based on equality and mutuality which Belgium expressed herself as being ready to conclude.

In reply to Belgium's offer to prepare a joint *compromis*, the Chinese Government in a note of November 16, 1926, pointed out that

> the point at issue between the two Governments is not the technical interpretation of Article 46 of the treaty of 1865, an article which is a striking symbol of the inequalities in the entire instrument. . . . The real question at bottom is that of the application of the principle of the equality of treatment in the relations between China and Belgium. It is political in character and no nation can consent to the basic principle of equality between states being made the subject of a judicial inquiry. . . . This declaration [of termination] is in conformity with the spirit of Article 19 of the Covenant of the League of Nations, which clearly recognizes the fundamental principle of *rebus sic stantibus* governing international treaties which have become inapplicable. Consequently, if an appeal is to be made to an international tribunal at all, the Chinese Government believed that it should be brought before the Assembly of the League by virtue of Article 11 of the Covenant.

Not being able to obtain a joint *compromis*, Belgium, on November 25, 1926, addressed a unilateral application (under Article 40 of the Statute) to the International Court, reviewing the facts and raising the question as to

China's right to denounce the treaty of 1865 under Article 46. The petition prayed the court

> to declare and judge, either in the absence or the presence of the said Government [of China], and after such time limits as the court may be pleased to fix, that the unilateral denunciation of the treaty of November 2, 1865, by the Government of the Chinese Republic was not justified.
>
> Pending said decision to indicate all provisions, measures to be taken for the safeguarding of the rights recognized by this treaty on Belgium and its *ressortissants*.

This application of Belgium was based upon the fact that both Belgium and China had theretofore agreed to accept as compulsory, *ipso facto* and without special agreement, the jurisdiction of the court in the classes of legal disputes set forth in Article 36 of the Statute:

(a) The interpretation of a treaty.
(b) Any question of International Law.
(c) The existence of any fact which, if established, would constitute a breach of an international obligation.
(d) The nature and extent of the reparation to be made for the breach of an international obligation.

This article also provides that

> In the event of a dispute as to whether the court has jurisdiction in these cases, the matter shall be settled by a decision of the court.

On November 26, 1926, the Registrar of the International Court notified the Chinese Minister at The Hague of the filing of the Belgian application and enclosed a copy of the same. The Registrar, among other things, called the attention of the Minister to the right of the parties, under Article 31 of the Statute, to select a judge of their own nationality to sit upon the bench. On January 3, 1927, the agents of Belgium filed with the court, within the prescribed time, the memorial of their government concerning the case, which was duly notified to the Chinese Government. The memorial reviews the diplomatic correspondence and negotiations between the two governments, and states the question before the court as follows:

> The question is therefore whether the unilateral denunciation by the Chinese Government of the Sino-Belgian Treaty can be considered as valid from a legal point of view either under the terms of the treaty itself or in virtue of the general principles of the law of nations.

The memorial then presents the arguments of Belgium under three headings:

(1) The terms of Article 46 of the Sino-Belgian Treaty.
(2) The principle of the judicial equality of states.
(3) The principle "*rebus sic stantibus*."

Finally, the memorial petitions the court that pending a decision the treaty of 1865 should be continued as a protective measure on behalf of Belgian interests in China.

Subsequently the court set March 16, 1927, as the date for China's first reply, and June 17 for her second reply, and the President of the court, by virtue of Article 41 of the Statute, ordered provisional measures for the protection of Belgian subjects, property and rights, based more or less upon certain articles of the treaty of 1865. Subsequently, negotiations were reopened between the two countries with reference to the conclusion of a new treaty, and Belgium asked for a continuance of the case and the withdrawal of the protective measures ordered by the court for the safeguarding of Belgian interests in China. It is understood that the court has acted accordingly.

This case is interesting as showing the method of procedure of an aggrieved state in bringing a case before the International Court by a unilateral petition and without the preparation of a *compromis*. Would the court render a decision on the *ex-parte* presentation of the Belgian Government should China decline to reply to the Belgian memorial? A more interesting question, however, is the relation of the composition of the court to the parties in interest and to the questions at issue. It should be observed that all except two of the members of the court who would pass upon this case are nationals of countries who have similar interests in China, which would be best maintained by upholding the Belgian contention in this case. In other words, the case would be decided by judges whose governments would be interested in continuing in force the Belgian Treaty of 1865.

L. H. WOOLSEY.

MEXICAN LAND LAWS

It was observed in an editorial comment in this JOURNAL (July, 1926, p. 526) on the subject of Mexican legislation concerning titles to land and to subsoil products that: "The situation would seem to have called for a good deal of justification and forbearance on both sides of this lamentable diplomatic controversy." Subsequent correspondence given out by the Department of State on November 24, 1926, indicates that this forbearance had been subjected to an excessive strain, and that a deadlock had been reached. The Department of State, having exhausted every resource of legal argument and friendly diplomatic warning, was left in the uncomfortable position of awaiting concrete cases of injury to American rights which might warrant formal protests and specific claims for redress. Secretary Kellogg, in a note to the Mexican Minister for Foreign Affairs, dated July 31, 1926, thus summarized the general principles upheld by the American Government in this controversy:

> First. Lawfully vested rights of property of every description are to be respected and preserved in conformity with the recognized principles of international law and equity.
>
> Second. The general understanding reached by the Commissioners of the two countries in 1923, and approved by both Governments at the

time of resumption of diplomatic relations between them, stands unmodified and its binding force is recognized.

Third. The principle of international law that it is both the right and the duty of a government to protect its citizens against any invasion of their rights of person or property by a foreign government, and that this right may not be contracted away by the individual is conceded.

Fourth. The principle that vested rights may not be impaired by legislation retroactive in character or confiscatory in effect is not disputed.

On the subject of the specific assurances given by the Mexican Commissioners in 1923 (see this JOURNAL, July, 1926, p. 523), Secretary Kellogg further added that without these assurances the recognition of the Obregon Government would not have been accorded. The reply of the Mexican Minister for Foreign Affairs, under date of October 7, 1926, stated with reference to the first and fourth of the principles asserted by Secretary Kellogg:

> With respect to this last I must remark that the mere retroactive character of a law, taken by itself and until it does produce confiscatory effects or is harmful in any other way when applied, cannot give rise to any objection whatsoever, nor be the cause of diplomatic representation. Taking into account this exception, my Government agrees with the two principles noted.

With respect to the second principle concerning the binding effect of the assurances given by the Mexican Commissioners in 1923, Minister Saenz observed:

> The Mexican Government . . . feels constrained to reiterate . . . that these conferences did not result in a formal agreement, outside of the Claims Conventions which were signed by the Executives of both countries and which were submitted for the approval of the Senates of Mexico and of the United States; and that the declarations of the Mexican Commissioners merely constitute a statement of the purposes of President Obregon to adopt a policy which, altogether approved and followed in its main points by the present President, cannot constitute a promise with the binding force of a treaty that the future Presidents must observe in all its details, and much less that it might bind the legislative power and the Supreme Court of Justice.

Minister Saenz expressly denied in this connection that the recognition of the government of General Obregon had been conditioned on the outcome of the conferences of 1923 and subject to the assurances given by the Mexican Commissioners.

With respect to the third principle enunciated by Secretary Kellogg concerning the right of a government to protect its citizens against invasions of their rights, Minister Saenz observed that:

> The right of States to protect their citizens or subjects abroad is recognized; that right is unassailable. But the foreign private persons are also given the right to apply to their governments for protection; the exercise of this right is subject to the will of the parties in interest and

> therefore they may forego its exercise without thereby affecting the right of the state concerned.
>
> The Mexican Government, therefore, does not deny that the American Government is at liberty to intervene for its nationals; but that does not stand in the way of carrying out an agreement under which the alien agrees not to be the party asking for the diplomatic protection of his Government. In case of infringement of any international duty, such as a denial of justice would be, the right of the American Government to take with the Mexican Government appropriate action to seek atonement for injustice or injury which may have been done to its nationals would stand unimpaired.

Reduced to its simplest terms, the above argument, which is typical of the entire correspondence on the part of Mexico, amounts to a denial of the right of a government to intervene in behalf of a national who has contracted away this right, though it is conceded that in case of a denial of justice of a limited kind, "appropriate action" may be taken "to seek atonement for injustice or injury which may have been done to its nationals." Minister Saenz furthermore took the position that, not only must a government await an actual concrete instance of injustice and injury, before making any representations, but "to offer remarks concerning possible injustice that might be committed in connection with the prospective enactment of certain laws is tantamount to a government meddling in the legislation of another." This denial of the propriety of friendly comments and representations by one government concerning impending legislation by another which might have the unforeseen result of widespread injustice accompanied by corresponding claims for reparations, would hardly seem borne out by international practice (see Borchard, "The Diplomatic Protection of Citizens Abroad," p. 401). A typical example of this kind of diplomatic representation is to be found in the comments of the British Government in 1912 concerning the proposal then before Congress to discriminate in favor of American vessels using the Panama Canal (see Supplement to this JOURNAL, Vol. VII, p. 46).

This correspondence further discloses a fundamental difference of opinion concerning the nature of a vested right, or acquired right, to use the phrase employed by Mexico (*derecho adquirido*). Secretary Kellogg contended that a vested right was an absolute right which was not "subject to curtailment or destruction through the enforcement of laws enacted subsequent to its acquisition." Minister Saenz, on the other hand, contended that: "There cannot be acquired rights properly so-called unless there be an act of appropriation, a possessory will (*voluntad posesoria*); neither is it necessary that the law should give its protection to mere rights than those the conquest of which has cost an effort, be it physical, intellectual or financial. To claim that the Mexican Government must protect and safeguard not only the acquired but also the potential rights is to impart to the idea of retroactivity of the laws an unjustified breadth." While this argument has particular

application to petroleum concessions where oil may not yet have been discovered, its general purport is clearly to "whittle away" foreign property rights in Mexico. This intention is plainly seen in the statement: "Whenever a law is enacted which brings a change in the ownership system, the main problem consists in laying down the temporary measures of a provisional character which make it possible to pass from one system to the other. The difficulty of these measures consists in the fact that two tendencies are met,—that of the created interests which would prefer and demand that the same system of law be continued and that of the general interests of the nation which require that the old rights adjust themselves to the new principles." *Mutatis mutandis*, a similar argument might well be advanced by the Soviet Government of Russia in its revolutionary reforms for the nationalization of the ownership of land and the abolition of the right of private property. It may be true that the general interests of a nation may require that old rights should adjust themselves to new principles. It is equally true, nevertheless, that international intercourse could never be carried on with any certainty of justice and peace if rights secured by hard labor, high intelligence, bold courage, and fine vision were liable to arbitrary annulment or serious lesion. International law in its solicitude for the protection of national interests would have to be thrown overboard under this conception of acquired rights. It is not strange that the Soviet Government in Moscow should show very slight respect for the principles of international law. It is most disquieting, however, that the present Mexican Government should give unmistakable evidence of a similar tendency. With all due regard for the serious national problems concerning the ownership of land in Mexico, it can hardly be conceded that foreigners will ever accept without the most serious and solemn protests the impairment of property rights acquired in good faith or the confiscation of these rights without what Secretary Hughes called "actual, fair, and full compensation."

The diplomatic deadlock reached in this correspondence was virtually acknowledged by Secretary Kellogg in a brief note to Minister Saenz, dated October 30, 1926, and by a still briefer reply from the latter dated November 17, 1926. Mexico took the position that it would only discuss "concrete cases in which recognized principles of international law may have been violated or may be violated in disregard of legitimate interests of American citizens since in such cases it will be disposed to repair such violations." The petroleum law went into effect on December 31, 1926, and the alien land law on January 21, 1927. Failure to comply with the provisions of these laws entailed the penalty of general confiscation. Some of the larger petroleum companies, including British and Dutch, as well as American companies, failed to comply with these provisions and resorted to judicial proceedings by way of injunction (*amparo*) to protect their interests. Certain of these were granted for various reasons, not exactly of a juristic kind, notably in one instance to prevent unemployment and discontent in the oilfields! It is

possible that the Mexican Government may be relieved of some of its diplomatic embarrassments through judicial interpretations of the laws in controversy. In the meantime, the suggestion of arbitration advanced by the United States Senate would hardly seem either opportune or exactly fitted to the situation. The proposal would seem inopportune in view of the right of the United States to insist on the fulfillment of positive promises of the nature of international engagements, or "gentlemen's agreements." Such matters normally are not even discussed, much less submitted to arbitration. Furthermore, the proposal for arbitration merely opens the door for indefinitely prolonged diplomatic negotiations to determine the bases for arbitration. A question of the right of a nation to legislate concerning such matters as land ownership has generally been held to be primarily a question of strictly domestic concern. Even if Mexico were sincerely willing to submit such a matter to the arbitrament of a third party, it would hardly constitute a wise precedent for the United States to accept. In view of the nature of the controversy and the technical legal arguments involved, this question, if submitted at all to further discussion, would seem better suited for a joint commission of Mexican and American jurists of tried capacity. Such a procedure would have the merit, at least, of removing from the plane of diplomatic correspondence a matter which might better have been handled by properly designated jurists from the start. The conduct of foreign relations should hardly be permitted at any time to take on the form of a litigation at long range. If the controversy is susceptible of some such disposition, there still remains the obligation to see that American rights are not impaired or destroyed in the meantime. And in any event, steps must be taken of a most definite and formal nature to make certain that there shall be no confiscation of American property in Mexico without "actual, fair, and full compensation."

PHILIP MARSHALL BROWN.

CONCERNING ATTEMPTS BY CONTRACT TO RESTRICT INTERPOSITION

A state may prescribe the terms on which it grants a concession. Those terms may in fact purport to restrict the freedom of the grantee to invoke the aid of his own state with respect to matters relating to the contract, or even to restrict the freedom of that state to interpose in his behalf.[1] Even though

[1] The restriction of governmental action may assume a variety of forms. It may, for example, proscribe "international reclamation" (Martini Case, Ralston's Report, Venezuelan Arbitrations of 1903, 819), or may contain the stipulation that "under no condition shall the intervention of foreign diplomatic agents be permitted" (North American Dredging Company *v.* The United Mexican States, General Claims Commission, United States and Mexico, Docket No. 1223, this JOURNAL, Vol. XX, p. 800). It may declare that "all diplomatic intervention is formally prohibited" (contract of the *Banque Nationale d'Haiti* referred to in For. Rel. 1915, 496–516). It may provide that "any questions or controversies" arising out of the contract shall be decided in conformity with the laws of the grantor and "by the

they are designed to restrain the grantee from the exercise of rights which he ought not to be called upon to give up, or to deter the state of which he is a national from interposing under circumstances when interposition is justifiable, action by the grantee in contempt of these conditions should at least confer upon the grantor the right to rescind the contract. Its privilege in this regard is derived from its right to fix the terms on which it makes any yielding.

The provisions of a contract restrictive of interposition or reclamation and of efforts by the grantee to effect either may be deemed by the state of the grantee or by an international tribunal as subversive of the law of nations and hence entitled to no respect. Nevertheless, the inability of the grantor to gain respect for the restrictive clause does not compel it to keep alive the contractual relationship on a different and less objectionable basis. In response to the contention that such a conclusion serves to enable the grantor to terminate the contract at will through its own tortious conduct possibly designed to effect interposition and in turn to excuse rescission, it may be said that on principle the grantor is always responsible to the grantee for such conduct, and that he obtains complete justice when he obtains damages which compensate him for the loss sustained thereby.[2] He never acquires, however, in consequence of that conduct, a right to continued enjoyment of his contract with the grantor on terms other or more favorable to himself than those fixed by his concession.

When the grantee, contemptuous of the terms prescribed by the grantor, proceeds to invoke the aid of his government, which in fact espouses his cause and interposes in his behalf, an interesting situation arises. It suggests the preliminary inquiry whether the grantee may, under any circumstances, divest himself of the right to invoke the aid of his own state while he remains its national.[3] It has been judicially declared that he can not validly give up

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competent tribunals of the Republic" (Turnbull Case, Ralston's Report, Venezuelan Arbitrations of 1903, 200).

It may be doubted whether grantor states have in fact employed particular phrases with a nice sense of distinction with respect to the nature or scope of the action which it has been sought to thwart.

See in this connection documents in Moore, Digest, VI, 293–309; excellent discussion in E. M. Borchard, Diplomatic Protection of Citizens Abroad, 800–810; "Decisions of the Claims Commissions, United States and Mexico," by same author, this JOURNAL, Vol. XX, 536; J. H. Ralston, Law and Procedure of International Tribunals, revised ed., 58–72.

[2] It is believed that the damages should be assessed on a delictual rather than a contractual basis.

[3] Declared Mr. Bayard, Secretary of State, to Mr. Buck, Minister to Peru, February 15, 1888: "This government can not admit that its citizens can, merely by making contracts with foreign powers, or by other methods not amounting to an act of expatriation or a deliberate abandonment of American citizenship, destroy their dependence upon it or its obligations to protect them in case of a denial of justice." (MS. Inst. Peru, XVII, 323, Moore, Digest, VI, 294.)

See also Mr. Bayard, Secretary of State, to Mr. Hall, Minister to Central America,

the right to turn to it to protect him against the consequence of internationally illegal acts committed by the grantor, but that he may divest himself of the right to call upon that state to interpose in other situations where, in the circumstances, interposition would lack justification under the rules of international law.[4] It may be unnecessary to attempt to determine from the available evidence of the law whether the alien grantee is to be deemed to possess no rights in the matter. Whatever be the correct conclusion, he may clearly subject himself to the operation of a penalty in case he does invoke the aid of his own state, as by impliedly authorizing the grantor in such event to rescind the contract. The fact of rescission for such a reason would not constitute the breach of an obligation by the grantor; and if rescission were in itself productive of interposition by the state of the grantee, it would not be productive also of a solid claim for reparation. The grantor would simply be asserting its right not to permit the continued enjoyment of a concession on terms other than those which it had prescribed.

It is not believed that the grantee may through his contract with the grantor deprive his own state of any right that belongs to it, such as that to interpose for cause in behalf of a national.[5] It may be that in the particular case,

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March 27, 1888, For. Rel. 1888, I, 134–137, Moore, Digest, VI, 295; same to Mr. Straus, Minister to Turkey, No. 115, June 28, 1888, For. Rel. 1888, II, 1599, Moore, Digest, VI, 296.

See also Aide-memoire, handed by the American Ambassador to the Mexican Minister for Foreign Affairs by instruction from the Secretary of State on November 27, 1925, Senate Doc. No. 96, 69th Cong., 1 Sess., pp. 5, 6.

[4] North American Dredging Company *v.* The United Mexican States, General Claims Commission, United States and Mexico, Docket No. 1223, this JOURNAL, Vol. XX, 800.

[5] "Under the rules of international law the claimant (as well as the Government of Mexico) was without power to agree, and did not in fact agree, that the claimant would not request the Government of the United States, of which it was a citizen, to intervene in its behalf in the event of internationally illegal acts done to the claimant by the Mexican authorities." (North American Dredging Company *v.* The United Mexican States, General Claims Commission, United States and Mexico, Docket No. 1223, this JOURNAL, Vol. XX, 800, 808–809. See also concurring opinion of Parker, Commissioner, *Id.*, 810.)

"Certainly a contract between a sovereign and a citizen of a foreign country can never impede the right of the Government of that citizen to make international reclamat on, wherever according to international law it has the right or even the duty to do so, as its rights and obligations can not be affected by any precedent agreement to which it is not a party; . . .

"This does not interfere with the right of a citizen to pledge to any other party that he, the contractor, in disputes upon certain matters will never appeal to other judges than to those designated by the agreement, nor with his obligation to keep this promise when pledged, leaving untouched the rights of his Government, to make his case an object of international claim whenever it thinks proper to do so and not impeaching his own right to look to his Government for protection of his rights in case of denial or unjust delay of justice by the contractually designated judges." (Barge, Umpire in Woodruff Case, Ralston's Report, Venezuelan Arbitrations of 1903, 151, 160.)

"I desire particularly to direct attention to the provision requiring foreigners to waive their nationality and to agree not to invoke the protection of their respective governments, so far as their property rights are concerned, under penalty of forfeiture. In this connection

respect for the terms of the contract does not involve the deprivation of that state of the exercise of any actual right; for both the existence and the known sufficiency of local remedies available to the grantee may serve to render interposition improper and unreasonable. It is important to observe, however, that what causes interposition to be unjustifiable in such a situation is the rule of international law rather than the contract between the parties. An arrangement purporting by its terms to restrict interposition including the steps leading up to it, merely in situations where that law clearly forbade interposition, would be unobjectionable.

The grantor may, however, be quite unwilling that the contract be merely declaratory of the requirement of international law and contain no deterrent additional thereto. Oftentimes contracts appear to give expression to a broader design. Thus they may purport to deprive the state of the grantee of the right, among others, to exercise its best judgment respecting the question whether in fact local remedies technically available to the grantee are really valuable, or serve rather as a cloak to conceal the effort of the grantor to evade an impartial adjudication before a tribunal empowered to scrutinize its conduct and to award damages against it. Respect for provisions of such a character would prevent the state of the grantee from interposing when it had solid reason to believe that the courts of the grantor were corrupt, or exposed to political interference likely to be exercised, or possessed of insufficient jurisdiction, and consequently, impotent or indisposed to mete out justice to an alien claimant such as the grantee. It may be doubted whether as yet any rule of international law serves to deprive a claimant state of the right to act on its best judgment as to the existence and sufficiency of ostensible remedies held out to its nationals by a foreign state or which denies to the former the right to ignore them for cause. This right, whatever be its content, can not be impaired by a contract between the grantor and the grantee.[6]

In a word, it must be apparent that both the grantor state and the state of

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it is my duty to point out that my government, in accordance with principles generally if not universally accepted, has always consistently declined to concede that such a waiver can annul the relation of a citizen to his own government or that it can operate to extinguish the obligation of his government by diplomatic intervention to protect him in the event of a denial of justice within the recognized principles of international law." (Aide-memoire, handed by the American Ambassador to the Mexican Minister for Foreign Affairs by Instruction from the Secretary of State on November 27, 1925, Senate Doc. No. 96, 69th Cong., 1 Sess., p. 5, 6.)

[6] Whether the restrictive provisions of a particular contract serve to impair the right of the state of the grantee must depend upon all the surrounding circumstances. Officers of foreign offices are aware of the great difficulty in determining even in the most judicial spirit whether those circumstances establish such an impairment. The frequency and extent of the difficulty suffice at the present time to raise doubt as to the wisdom of attempting to gain recognition of a fresh rule imposing greater restrictions upon claimant states than are now acknowledged to exist.

the grantee possess rights which the individual grantee through his contract with the former does not impair. He can not deprive the grantor of the right to withhold from him the continued enjoyment of the concession on terms other than those embodied in the contract. Regardless of whether he may divest himself under any circumstances of the right to appeal to his country, he may at least subject himself to the penalty of loss of continued enjoyment of his concession in case he does so. He can not deprive his own state of any right of interposition or reclamation which in the circumstances the law of nations permits it to exercise.

The problem confronting the foreign office of the state of the grantee is first, to determine whether on the facts before it the restrictive clauses of the contract would serve, if respected, not only to injure the grantee himself, but also to impair the right of his state to interpose for cause; and secondly, to consider the probable effect of interposition upon the rights of the grantee in relation to any claim by him to continued enjoyment of his contract. The problem confronting an international tribunal arising from a controversy concerning the effect of the provisions of the contract restrictive of interposition and of steps leading up to it is quite a different one.[7] It is primarily to determine the design of the contracting parties as manifested by the convention establishing the tribunal.

The question for judicial determination is, broadly, whether the convention registers the consent of those parties to clothe the tribunal with jurisdiction to pass on the particular claim. There is involved herein the more precise inquiry as to the scope of any jurisdiction that may have been yielded. Thus, if jurisdiction is found to have been conferred, the question arises whether the grantor state has agreed to substitute an international for a national forum for the adjustment of the entire controversy regardless of the presence of any restrictive clause in the contract, or whether that state has agreed to confer upon the tribunal authority merely to consider the effect of the contractual restriction upon the rights of the parties. The tribunal may in fact conclude on the evidence before it that the convention expressed the design of the contracting parties to confer upon it jurisdiction sufficient for a comprehensive adjudication, and that the comprehensiveness of that jurisdiction was manifested by a waiver of the right to demand respect for the restrictive clauses in the contract either as a complete obstacle to jurisdiction, or as a limitation upon that conferred.

The point to be observed is that the correct interpretation of the particular convention ought not to baffle the tribunal burdened with the task. As in other kindred problems there is involved an inquiry as to the sense in which the particular terms are used. Inasmuch as the contracting parties are free to attach any significance to those which they see fit to employ, the search for evidence of the fact must be thorough and broad. There is no restric-

[7] The writer has been encouraged by his colleague, Mr. Philip C. Jessup, to emphasize this distinction.

tion with respect to the nature of what is probative thereof. The true light may come from what is extrinsic to the document.

CHARLES CHENEY HYDE.

LIMITATIONS ON COERCIVE PROTECTION

There are numerous doctrines of international law which serve to put off indefinitely the day when permanent peace may reign among the nations. Among these are the institution of conquest, the refusal to admit the doctrine that duress makes treaties voidable, the belief in the existence of the *rebus sic stantibus* clause in treaties, the supposed doctrine that private property may be charged with a lien or taken for the payment of governmental debts—a revival of confiscation—and the doctrine that citizens abroad may be protected by force of arms for alleged violations of international law practised against them. I shall address myself only to the latter institution, and shall venture to suggest what seems to me a necessary limitation and a practical reform. The protection of citizens in immediate danger of life in areas given over to anarchy will not be discussed.

Protection by the nation of a citizen abroad reflects one of the most primitive institutions of man—the theory that an injury to a member is an injury to his entire clan. It seems questionable whether in the highly integrated organization of the world today this practice is either necessary or desirable to secure for the citizen abroad the assurance of international due process of law.

A cursory examination of the existing practice will demonstrate the inefficiency, if not, indeed, the unfairness of the system. When the citizen abroad is injured he is expected first to exhaust his local remedies, except in cases where, the injury resting upon legislation, the law is not reviewable or reversible by the local courts, as in the case of prize courts operating under municipal statutes which violate international law. Assuming that the local remedy is ineffective, the citizen may invoke the diplomatic protection of his own government. That government may act as it sees fit in the matter, either extend good offices, make diplomatic claim, or institute coercive measures of protection in the event that diplomacy fails. Coercive measures invite the danger of war, involving all the people of the claimant's state.

Under this system all three parties to the issue, the individual, the defendant nation, and the claimant nation, are in a precarious and unhappy condition. Politics rather than law governs the outcome of the case. If the individual is a member of a strong clan (state), he may be able to obtain the aid of his nation; if not, he is in this respect helpless. Thus his relief, which should be governed by legal rule, depends on the accident of his nationality. It will also depend on the momentary political relations between the plaintiff and the defendant states, the political strength of the defendant state, and on other non-legal factors. The defendant state is in the position of

having coercion exercised against it on the unilateral determination of a foreign government that its citizens' rights have been violated. The weaker the state, the more exposed is it to arbitrary interposition or intervention, until in very weak states a responsibility amounting almost to a guaranty of the security of foreigners and their property is imposed. Such a state may, indeed, to avoid the threat of intervention or compulsory measures, pay a claim essentially unjust. A strong defendant state, on the other hand, may, without fear of interposition, violate with impunity the rights of an alien and may decline to arbitrate. The unfortunate factor in most intervention is that the complaining state is likely to constitute itself plaintiff, judge, and sheriff at one and the same time. This can hardly be deemed "the rule of law" or "reign of law," as Maitland put it. Nor is the plaintiff state exactly in a happy position. It must make *ex parte* determinations on inadequate evidence, and may be influenced by domestic political considerations to espouse a claim it does not fully endorse. It may, on the other hand be unable by virtue of its political relations with the defendant state to press a claim which makes a strong appeal legally and equitably.

Thus all three parties to the issue—which involves a question whether the citizen abroad has sustained a denial of justice (international due process of law), a purely legal question—are exposed to the disturbing interference of politics as a determining factor. This does not make for the growth of law or for peace.

As an alternative, it has been suggested in numerous circles, both of the "exploiting" and "exploited" countries, that the citizen abroad should be left to bear the risk of his location, and that he should take the law as he finds it. The effort of defendant governments to force aliens to abide by a so-called "Calvo" clause and to forego the privilege of invoking the diplomatic protection of their own governments, whether in constitution, law or contract, has not been generally successful, and diplomatically states have refused to be bound by such an alleged waiver on the part of their citizen abroad. The suggestion of leaving the citizen to the local law for his redress may result in depriving him of the protection of international due process. To that he is entitled, and the question is how far international law should go in securing it for him.

Under the existing system the issue is determined by the *ex parte* views of the strong state, whether plaintiff or defendant. Force is the *ultima ratio*, and that is likely to weaken the reign of law. The resort to arbitration instead of being regarded as a part of due process in the prosecution of claims is, as a rule, deemed a matter of expediency only. The suggestion recently made that intervention becomes proper and arbitration may be declined if the defendant state seems (to the complaining state) too poor to pay any judgment or award found against it, is not warranted by anything to be found in international law. It is an indication of the easy rationalization of force. A poor country, under the view thus advanced, is to be invaded

whenever a strong state charges it with violation of international law. It may not exercise normal legislative powers except with the consent of foreign states, and worst of all, it may not even invoke arbitration, for it may be deemed financially unable to pay an eventual award.

It has been suggested heretofore that the nations should voluntarily agree automatically to submit all pecuniary claims to arbitration if diplomacy failed, and that arbitration should be deemed an inherent part of due process in such matters. At the Pan-American Conferences of 1902 and 1910 the nations on this continent committed themselves to such a course. The larger European nations have been unwilling up to this time to consent to treaties providing for the mandatory submission to judicial determination even of indisputably legal questions. Were this done, all three parties to the issue would be assured of the protection of law rather than the domination of politics. The individual alien would not depend for his rights on the accident of nationality, the defendant state would rely on law for the determination of its rights and for protection against unjust intervention, and the plaintiff state would be relieved from the pressure of politics inducing intervention, from the danger of war and from the charge of imperialism and naked might.

It is submitted that international law may well go a step further. Whether or not the nations agree to submit such legal issues to arbitration, the individual himself should have the opportunity of trying the issue in the international forum before his state becomes politically involved in the case. Thus, before intervention becomes proper, he should be required not only to exhaust his remedies in the local courts, but he should also have the opportunity of instituting a suit against the defendant state before an international court, if he believes that international due process of law has been violated to his prejudice. This is not a radical step, for it was employed in the Central American Court of Justice of 1907, in the abortive International Prize Court, and has been approved on occasion by claims commissions. It would require treaties by which states would agree to permit themselves to be sued, but there would be a strong incentive on the part of both defendant and plaintiff states to institute this intermediary forum. What is desired is to assure the alien the protection of due process of law without the necessity of coercion and all that armed force implies, physically, psychologically, politically and legally. By enabling the injured citizen to sue the defendant state in the international forum, possibly with the financial aid of his government if the claim is deemed meritorious, all three parties to the issue and the cause of peace would be benefited, for they would rely upon legal processes for the assurance of international due process of law to the alien. That is all any of the parties has the right to ask. Such treaties would be easier for the European and Latin-American states to conclude than they may be for those of the Anglo-American world, where the tradition that the government may be sued in courts at the instance

of individuals is not yet fully established. An analogy from administrative law lends support to the theory and practice suggested. In the eighteenth century the natural law school of jurists advocated the right of resistance to unlawful acts of state prejudicing the individual. As that spelled disorder, the state met the popular demand for defense against illegal acts by instituting administrative and sometimes judicial courts in which the validity of its acts could be tested and determined. That is what is needed in international law, and it does not seem an unusual demand to make upon the nations. To promote the reign of law by permitting the government to be sued for injuries it inflicts by its agents should not invite opposition. To extend the practice from the local to the international forum is but a slight advance. The institution of the practice would remove from the political to the legal field an important department of international relations.

EDWIN M. BORCHARD.

PROJECTS FOR THE CODIFICATION OF AMERICAN INTERNATIONAL LAW

The International Commission of Jurists for the Codification of International Law, composed of two delegates from each of the Latin American republics and the United States, will meet at Rio de Janeiro on April 16, 1927, in accordance with the resolution [1] adopted by the Fifth International Conference of American States at its session held at Santiago, Chile, on April 26, 1923. The basis of the Commission's discussions will be the thirty projects for the codification of international law prepared by the American Institute of International Law pursuant to the resolution adopted by the Governing Board of the Pan American Union on January 2, 1924, by which the Governing Board submitted to the Executive Committee of the American Institute of International Law "the desirability of holding a session of the Institute in 1924 in order that the results of the deliberations of the Institute may be submitted to the International Commission of Jurists at its meeting at Rio de Janeiro."[2] These projects, in the form of proposed conventions, are as follows: (1) Preamble; (2) General Declarations; (3) Declaration of Pan American Unity and Coöperation; (4) Fundamental Bases of International Law; (5) Nations; (6) Recognition of New Nations and Governments; (7) Declaration of Rights and Duties of Nations; (8) Fundamental Rights of American Republics; (9) Pan American Union; (10) National Domain; (11) Rights and Duties of Nations in Territories in Dispute on the Question of Boundaries; (12) Jurisdiction; (13) International Rights and Duties of Natural and Juridical Persons; (14) Immigration; (15) Responsibility of Governments; (16) Diplomatic Protection; (17) Extradition; (18) Freedom of Transit; (19) Navigation of International Rivers; (20) Aerial Navigation; (21) Treaties; (22) Diplomatic Agents; (23) Consuls; (24) Exchange of Publications; (25)

[1] Special Supplement to this JOURNAL, Vol. XX, 1926, p. 295.
[2] This JOURNAL, Vol. XVIII, 1924, pp. 269–270.

Interchange of Professors and Students; (26) Maritime Neutrality; (27) Pacific Settlement; (28) Pan American Court of Justice; (29) Measures of Repression; (30) Conquest.

The genesis of these projects is described in an editorial in this JOURNAL (Volume XIX, 1925, p. 333) by Dr. James Brown Scott, one of the representatives of the Government of the United States on the Commission of Jurists, and they are printed in full in the Special Supplement to this JOURNAL, Volume XX, 1926, pp. 300–384.

The Board of Editors of the JOURNAL has deemed it appropriate to comment upon these projects. A discussion of Projects Nos. 14, 15, 16, 17, 18, 19, 20, 26, 27, 28, 29 and 30 is contained in the January, 1927 number of this JOURNAL (Vol. XXI, pp. 118–146), and it is the purpose of this editorial to discuss briefly projects Nos. 1–9.

The main objective of all of these projects is the codification of American International Law, and through them all runs the unmistakable implication that a distinction must be drawn between American International Law and European, or General, International Law. This distinction apparently is not limited to the law governing the relations of the American nations between themselves, but applies also to the development of international law in the relations between the American nations and non-American nations.

In order to emphasize the distinctive Americanism of the international law which is to be codified by means of these projects, each of them is framed in the form of a treaty between the American nations exclusively. Many of them in terms call especial attention to the solidarity and common interests of the American nations and the consequent advisability that they should determine for themselves the principles and rules governing their international intercourse.

The first four of these projects, together with Project No. 9, all emphasize the desirability of developing solidarity among the American republics, and the necessity for differentiating, to a certain extent, American international interests and relations from those of non-American nations.

For instance, the Preamble for all of these projects, which in itself is Project No. 1, recites that it is one of the great duties of the American republics "to strengthen the bonds of solidarity between them which nature and history have happily established" and that "it is incumbent upon the American Republics to determine among themselves alone the rules which shall regulate simply their reciprocal relations."

The Preamble also points out that although "international law originated and developed on the European continent and has thence been extended to all the nations of the world," nevertheless, "outside of Europe certain rules or principles have been modified in conformity with the special conditions prevailing in certain regions." So also, the General Declarations, which constitute Project No. 2, recognize that although the international law in force in Europe is applicable to the American republics, nevertheless "they have

maintained the power to proclaim other principles or rules more in harmony with the new conditions of their existence and more favorable to their free development. They have claimed especially the right to establish fundamental bases for American international society in conformity with their necessities and aspirations."

These General Declarations define the body of law to be known as American International Law, as follows:

> By American International Law is understood all of the institutions, principles, rules, doctrines, conventions, customs, and practices which, in the domain of international relations, are proper to the republics of the New World.
>
> The existence of this law is due to the geographical, economic, and political conditions of the American Continent, to the manner in which the new republics were formed and have entered the international community, and to the solidarity existing between them.

Lest these Declarations should be taken to have a more far-reaching effect than was intended, they conclude with a final limitation, as follows:

> American International Law thus understood in no way tends to create an international system resulting in the separation of the republics of this hemisphere from the world concert.

Project No. 3 adopts as a Declaration of Pan American Unity and Coöperation the principles stated by Mr. Elihu Root, as Secretary of State, at the Third Pan American Conference, held at Rio de Janeiro in 1906,[3] which have already, by virtue of their universal appeal to every American nation, become embodied in American International Law. This Project also adopts the declaration made by Mr. Root, as Secretary of State, in his address on laying the corner stone of the Pan American building in Washington in 1908,[4] stating as a working basis for an American peace policy that:

> There are no international controversies so serious that they can not be settled peaceably if both parties really desire peaceable settlement, while there are few causes of dispute so trifling that they can not be made the occasion of war if either party really desires war.

Project No. 4, which undertakes to define the Fundamental Bases of International Law, consists of six sections, (1) "Nature and extent of international law"; (2) "Elements of general international law"; (3) "Source; obligatory force in America of international rules, customs, or practices; abrogation"; (4) "Development and interpretation of the rules of international law in America"; (5) "Value of national laws, diplomatic precedents, arbitral awards, and opinions of publicists"; (6) "Sanctions of international rules in America."

[3] Secretary Root's Speeches in South America, 1906, p. 12, quoted in this JOURNAL, Vol. III, pp. 424–5.

[4] This JOURNAL, Vol. II, pp. 522–4.

The provisions of Sections 1 and 2 consist of definitions, based for the most part upon accepted authorities and classifications. Article 4 of Section 1 is of particular interest in relation to the present controversy about the so called confiscation policy of foreign owned property in Mexico. It provides: "National laws should not contain provisions contrary to international law."

The remaining sections deal with international rules to be developed on the American continent. Apparently the general principles of international law are subordinated to the international rules adopted on the American Continent, because it is provided that rules established by conventions, signed by the republics, even if they have not yet been ratified, "should be considered as a manifestation of the legal consciousness of the New World," and only in the absence of rules derived from this source, among the others enumerated, "shall recourse be had, in the international relations of American republics, to the rules of universal international law in so far as they are not contrary to the American principles indicated above."

The idea of American solidarity is again introduced by the provision that "international rules should always be developed and interpreted in a spirit of international solidarity and general utility."

This and the preceding projects all lay the foundation for the enlargement of the authority and importance of the Pan American Union as proposed in Project No. 9.

The Pan American Union, as at present organized, owes its origin and continued existence to resolutions adopted by the Pan American Conferences held from time to time since 1889 by the twenty-one American republics, and it is maintained by funds contributed through voluntary appropriations by those republics. It is now functioning under authority of a resolution adopted by the Fifth International Conference of American States held at Santiago, Chile, in 1923.

The direction of the Pan American Union is controlled by a Governing Board composed of the diplomatic representatives of the American republics accredited to the Government of the United States, and the Secretary of State of the latter country. Its President and Vice President are elected by the Board. Its administration is in the charge of a Director General appointed by the Board, who has power to promote its development in accordance with the regulations and resolutions of the Governing Board, to which he is responsible. The Board also appoints an Assistant Director who acts as its Secretary.

While the Pan American Union has been in existence continuously for many years, its permanence is dependent upon the voluntary assent of the governments maintaining it. One of the purposes of Project No. 9 is to establish the Pan American Union on a more permanent basis by substituting a treaty as its charter in place of a conference resolution.

The Pan American Union as organized under the proposed treaty retains

substantially all of its old functions under the resolution, but, instead of acting merely as an administrative agency for the twenty-one American republics, certain political activities on the part of the Union now seem to be contemplated. As recited in the preamble of this Project, "The Pan American Union, perfected in the course of the various conferences held by the American republics, should be the framework for the said organization." The "said organization" is the reorganized Pan American Union, which is projected in the preamble as follows:

> It is necessary to organize American international life on the basis of coöperation and in such a way that this organization may reflect the legal consciousness and opinion of the Republics of the New Continent.

It is accordingly proposed that the American republics agree in this treaty that:

> The Pan American Union is a permanent organ of conciliation and coöperation between the Republics of the New World.
>
> All the American Republics have the right to be represented in the Union on the basis of equality.

In recognition of this right, representation by a government not recognized by the United States is ensured by the provision that:

> The American Republics which for any reason whatever may not have a diplomatic representative accredited to the Government of the United States of America may appoint a special representative to the Board of the Union.

In connection with the proposed new activities of the Union it is of interest to note the following provision from Project No. 4 (Article 22):

> American Republics directly injured by a violation of international law may address themselves to the Pan American Union in order that it may bring about an exchange of views on the matter.

One of the most important of the new functions conferred upon the Union by this treaty is:

> The Pan American Union may appoint a special commission, which shall have the following duties:
>
> 1. To see that a maritime map of the American Continent is drawn, on which shall be indicated the different zones to be distinguished for navigation, especially the territorial sea and the part contiguous thereto. This map should also indicate the regions to which the present convention is not applicable, particularly the antarctic and polar regions.
>
> 2. To see to the observance of the most absolute freedom of navigation in accordance with this treaty, and to see that no nation interferes with it even indirectly. Every violation which appears to be established by the special commission shall be communicated to the Pan American Union.
>
> 3. To recommend to the Pan American Union any other measure relating to maritime navigation which it may deem useful.

4. To register and publish the laws and regulations on the subject of navigation enacted by the American Republics.
5. To study the best method of making the provisions of the laws and regulations referred to in the preceding paragraph uniform.

Project No. 5, Nations, states the elements entering into the international conception of a nation. Its chief purpose apparently is to declare that all the American republics possess the necessary elements of sovereignty and, therefore, are nations, and that inasmuch as nations are legally equal "the rights of each do not depend upon the power at its command to insure their exercise." The declaration that the American republics are nations seems to be superfluous because, if the American republics were not nations in the international sense, a treaty entered into by them declaring that they are nations would not make them so. The declaration as to the rights of nations is duplicated in Projects No. 7 and No. 8, which would seem to be a more appropriate place for such declaration.

Project No. 7, Declaration of Rights and Duties of Nations, is a reproduction, with certain formal changes to put it into treaty form, of the Declaration adopted by the American Institute of International Law at its First Session in the City of Washington, January 6, 1916, with the addition of the following article:

> The American Republics recognize it as a fundamental duty to furnish instruction to their nationals in their international obligations and duties as well as in their rights and prerogatives, thus creating the "international mind" and the public opinion which shall in the future obtain by persuasion what force has failed to gain in the past.

This Declaration, as originally adopted, was the subject of an editorial comment by one of its joint authors, Dr. James Brown Scott, in this JOURNAL (Volume X, 1916, p. 124), which makes further comment here unnecessary.

Project No. 8, Fundamental Rights of American Republics, proclaims for the American republics a doctrine of non-interference with each other except only by "friendly and conciliatory action without any character of coercion," and forbids the cession by any American republic of any part of its territory to a non-American nation, or the occupation "even temporarily of any portion of the territory of an American Republic in order to exercise sovereignty therein, even with the consent of the said Republic." This Project is also of interest in relation to the proposed extension of the functions of the Pan American Union in that it provides that in case of the violation of the provisions above mentioned, or in case of "menace, offense, or acts of violence, individual or collective, committed by those nations [apparently either American or non-American nations] with respect to an American Republic, the continental solidarity will be affected thereby, and any American Republic may address the Pan American Union with the object of bringing about an exchange of views on the subject."

Project No. 6 deals with the Recognition of New Nations and of New Governments, and is merely declaratory of settled rules of international law on the subject.

This Project is of special interest, however, in that, in effect, it repudiates the non-recognition policy adopted by the Central American republics among themselves in their treaty of February 7, 1923, prohibiting the recognition of a new government, in any of those republics, coming into power through a *coup d'etat*, or a revolution, which alters its constitutional organization.

This Project provides that:

> Every abnormally constituted government may be recognized if it is capable of maintaining order and tranquillity and is disposed to fulfill the international obligations of the nation.

In other words, a *de facto* government may be recognized regardless of its constitutional, or *de jure*, status.

This provision conforms to the traditional policy of the United States. Since the time of Thomas Jefferson the United States, except for a very brief period and under exceptional circumstances, has consistently followed the policy, introduced by him in our foreign relations, of granting recognition to new governments on the purely *de facto* principle, in distinction from the theory of legitimacy, which then controlled European governments in their international relations.

The *de facto* principle is based upon the jural equality of nations, and the sovereign right of the people of each nation to determine for themselves their own form of government. The *de facto* principle is accordingly basically antagonistic to the *de jure* principle, which rests on the assumption that the government of one nation is entitled to pass on the legitimacy of the government of another nation, thereby subordinating the internal affairs of one nation to the approval of another nation, and introducing considerations of domestic policy into international relations.

The question of the constitutionality of an act of congress or of a government is a domestic political question, which certainly the United States in its own case would refuse to submit to the decision of any other government.

A practical demonstration of the impracticability of the *de jure* policy, which was adopted by the Central American republics, has been furnished by the recognition by the United States of one government in Nicaragua and the recognition by Mexico of another, each as the *de jure* constitutional government.

The unfortunate results of our intermeddling in Nicaraguan domestic politics during the Chamorro régime, and especially in attempting to decide upon the constitutionality of the political acts of the National Congress of Nicaragua, demonstrate the wisdom of our traditional policy of recognizing, as proposed by this project, a *de facto* government without attempting to pass upon the domestic question of its constitutionality.

CHANDLER P. ANDERSON.

PROJECTS OF THE AMERICAN INSTITUTE OF INTERNATIONAL LAW ON TREATIES, DIPLOMATIC AGENTS, AND CONSULS

Project No. 21 of the American Institute of International Law relating to Treaties would from the brief preamble indicate it to contain "the principles and rules of international law applicable to treaties," but it will cause little surprise to find that the provisions of the project do not cover so wide a field. Instead, the six articles do no more than formulate a few of the rules relative to the negotiation and interpretation of treaties. It would therefore be more appropriate to include in this preamble a statement to the effect that the enumeration of the particular rules included in the project should not be understood to exclude others as evidenced in the practice of states.

Article 1 declares the capacity of the contracting nations to negotiate treaties, but if they were to sign the project it might not be necessary to make a declaration so obvious from the very act of signature. Nor is it quite correct to state that "All the contracting nations have complete capacity to negotiate treaties and conventions of all kinds soever," since some of these states expected to sign may not enter into certain treaties because of special circumstances and peculiar relationship to the United States. The remaining portion of Article 1 states that these treaties may be negotiated "according to the form and conditions contained in their respective national laws." Either this is too obvious a truth to state, or it is intended to bring into international consideration the constitutional provisions of each state. Even in the latter case it should not be made a ground for captious criticism, since there is a tendency all along the line for international law to take into account the constitutional aspects of governmental action. The latest manifestation is the sending to Washington and elsewhere of representatives of certain of the component parts of the British Empire.

Article 2, codifying the customary provisions relative to the appointment and credentials of negotiators, requires no particular comment. The same is true of Article 3 relative to ratification, except that the concluding paragraph, which declares that "the treaty is binding for each of the contracting parties" from the date of the exchange of ratifications, leaves it a little doubtful whether this means that after ratification treaties retroactively take effect from the date of the signature. A treaty, like a contract between private individuals, is intended to give evidence of the meeting of the minds. The minds of the two governments acting for the respective states meet through the negotiators at the moment when they set their signatures to the final articles of the treaty. Ratification is merely a delay agreed to in order to permit the governments or states concerned to examine the acts of their agents and to decide whether they will approve or reject them.

Article 4 is of value in that it declares that "Every amendment, modification, or addition to the text of a treaty is a new proposal," and in consequence

recognizes the right of the other party to withhold its consent to such alteration. It might, however, have been better, instead of declaring the right of refusal, to indicate that the other party might declare such alteration equivalent to a refusal to ratify, since no state likes to accept the odium of responsibility for a failure to ratify. The concluding paragraph of Article 4 correctly states the law that a failure to ratify a treaty "must not be considered as an unfriendly act." It is, nevertheless, an act which, when without substantial reasons, may justly cause the other state to feel that there has been a lack of what Franklin, in answering the complaint of Vergennes, called "bienséance."

Article 5 does no more than codify the fundamental obligation to observe good faith in fulfilling a treaty. Article 6 deals with the termination of treaties. It would seem important also to include among the causes of their obsolescence such a radical change in circumstances as to cause the treaty no longer to apply to the same subject matter as that which the contracting parties originally had in mind. This rule is generally expressed by the Latin phrase *rebus sic stantibus*, and is understood as tacitly included in every treaty. Treaties are, nevertheless, presumed to be valid and to endure so that a state alleging a fundamental change in circumstances as a cause of abrogation of a particular treaty should indicate beyond every reasonable doubt that such a modification has taken place; otherwise the failure to fulfil the treaty will be justly regarded as a violation of the obligation to observe good faith.

Project No. 22, relative to Diplomatic Agents, follows appropriately after the consideration of treaties which it is often the important function of diplomats to negotiate. This project contains thirty-two articles relative to the accrediting, reception and rights of diplomatic representatives and of agents sent on special missions. It is not necessary to go into any detailed discussion of these provisions. They will for the most part be found to conform to the principles generally recognized by the states in their practice.

Article 10 declares that when there is objection to the reception of a particular diplomatic representative, the objecting nation "is not obligated to state reasons therefor." This is correct, since it is necessary that every government reserve the right to refuse to receive any person with whom it does not feel that it can successfully carry on diplomatic negotiations. To state the grounds of its objection might lead to recriminations and endanger the maintenance of cordial if not of peaceful relations. No state will, however, lightly refuse to receive the diplomatic representative which a friendly state proposes to dispatch.

Article 22 is of particular interest in some of the states whose jurists participated in the elaboration of this project of a code. It provides that "The diplomatic agent is obliged to surrender to the competent local authority any individual pursued for crime or misdemeanor under the law of the country to which he is accredited, who may have taken refuge in the

house occupied by the agent or in that of the legation. Should the agent refuse to surrender him, the local authority has the right to guard the house of the agent or of the legation until the government of the agent decides upon the attitude which he will take." Spain did not follow this course in 1726 when the Duke of Ripperda, who took refuge in the British Embassy, was seized therein. The relations between the two states became strained, and this disregard of diplomatic immunities was one of the contributing causes of the subsequent rupture of peaceful relations.

By limiting its denial of the right of asylum to the case of individuals pursued for crime or misdemeanor, the project avoids the controversial question of the right of "temporary refuge" in time of political disorder. In many states of South America such "temporary refuge" has not infrequently been afforded to unfortunate politicians who have been caught unawares by a sudden revolution.

Article 27 enumerates certain matters in regard to which the project would have it that diplomatic agents are not exempt from the local jurisdiction, and raises many interesting questions. If this article were adopted, the power of the local tribunal to accept jurisdiction in the enumerated cases affecting foreign representatives might make it possible for the authorities of the receiving state to harass a diplomatic representative and virtually to destroy that complete freedom from local control which is essential to the fulfillment of his office.

The concluding paragraph of Article 30, which extends the exemption of local jurisdiction to the servants of diplomatic representatives, adds a clause to the effect that if they "belong to the country where the mission resides, they shall not enjoy such privilege except when they are in the legation building." This obviously raises a very important and most difficult question and one which is not likely soon to be settled.

The preamble of Project No. 23 relating to Consuls refers to the American Republics formulating these rules as "considering it well in conformity with the requirements of economic life, to regulate the questions relating to consular agents. . . ." Exception should be taken to this undue emphasis on the commercial nature of the consuls' duties. It is true that consuls are in first instance the agents of the government entrusted with the protection of the economic interests of their states. Nevertheless, these officers have other important duties to perform. Within the limits of the consular district they protect nationals from arbitrary imprisonment or from other disregard of their rights. They transmit to their government important political information relative to the matters which come under their observation. Locally they are considered to represent the state from which they come. Unfortunately for the consuls, it is generally the diplomats who write about their immunities and draw up projects of codification.

The eleven articles of the project under consideration, relative to consular rights and duties, are in general conformity with the practice of states and

are not likely to give rise to controversy. They are not, however, to be considered as a comprehensive regulation of consuls in their relations with the receiving state. In this respect Project 23 is much less complete than its predecessor which relates to the other branch of the foreign service.

From the viewpoint of style the projects are rather uneven and the rules relative to treaties are less precisely defined than are those relating to diplomats and consuls. The language of the latter project seems of the three to be the one most clearly and juridically formulated. Taken as a whole, these projects relative to the rights and duties of diplomats and consuls and the provisions governing the negotiation and termination of treaties should be of service as indicating certain general principles which have received the support of a large number of distinguished jurists and statesmen from the states of this continent.

ELLERY C. STOWELL.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 16, 1926–FEBRUARY 15, 1927
(With references to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *C. A. P.*, Collection of Advisory Opinions of Permanent Court of International Justice; *C. J.*, Collection of Judgments of the Permanent Court of International Justice; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Cur. Hist.*, Current History (New York Times); *E. E. P. S.*, European Economic and Political Survey; *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *G. B. Treaty Series*, Great Britain, Treaty series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Official (France); *L. N. M. S.* League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series; *Nation* (*N. Y.*); *N. Y. Times*, New York Times; *P. A. U.*, Pan American Union Bulletin; *Press Notice*, U. S. State Dept. press notice; *Rev. int. de la Croix-Rouge*, Revue international de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

June, 1926

4 CZECHOSLOVAKIA—GREAT BRITAIN. Protocol to extradition treaty of Nov. 11, 1924, signed at London. Text: *G. B. Treaty Series* no. 31 (1926), *Cmd.* 2779.

22 PORTUGAL—UNION OF SOUTH AFRICA. Agreement signed at Cape Town relating to boundary between South West Africa and Angola. Text: *G. B. Treaty Series* no. 29 (1926), *Cmd.* 2777.

30 RUMANIA—SERBIA. Signed protocol at Bucharest renewing for three years the convention of defensive alliance, signed June 7, 1921. Text: *E. E. P. S.*, Feb. 15, 1927, p. 274.

July, 1926

1 PORTUGAL—UNION OF SOUTH AFRICA. Agreement regulating the use of water of Kunene River for hydraulic power and irrigation purposes, signed at Cape Town. Text: *G. B. Treaty Series* no. 30 (1926), *Cmd.* 2778.

August, 1926

31 AFGHANISTAN—RUSSIA. Treaty of mutual recognition of independence, signed Feb. 28, 1921, extended by new agreement signed at Pagman. *E. E. P. S.*, Feb. 15, 1927, p. 268.

31 WORLD POWER CONFERENCE. Opened at Basle. *Times*, Sept. 1, 1926, p. 11.

September, 1926

14 PRESS CONGRESS OF THE WORLD. Opened 3d Assembly at Geneva. *N. Y. Times*, Sept. 15, 1926, p. 19.

20 ESTONIA—SWEDEN. Swedish Government announced members of conciliation commission set up under convention of May 29, 1925. *L. N. O. J.*, Nov., 1926, p. 1529.

28 BELGIUM—ESTONIA. Most-favored-nation trade and navigation treaty signed. *Commerce Reports*, Jan. 17, 1927, p. 183.

October, 1926

12 FRANCE—TURKEY. Signed special agreement for submission to Permanent Court of International Justice, the question of jurisdiction in case of collision of steamers "Boz-Kourt" and "Lotus." *L. N. M. S.*, Feb., 1927, p. 3.

14 NARCOTIC CONTROL. United States Government sent identic notes to each of the powers signatory to the Hague Opium Convention, requesting coöperation in preventing illegal entry of narcotic drugs. Text: *Press notice*, Dec. 21, 1926. *U. S. Daily*, Dec. 23–24, 1927.

20 FRANCE—GUATEMALA. Commercial modus vivendi signed at Guatemala, effective Dec. 1, 1926. *Commerce Reports*, Dec. 20, 1926, p. 767. Text: *J. O.*, Nov. 30, 1926, p. 12569.

27 CHINA—FINLAND. Signed treaty of friendship. *U. S. Daily*, Dec. 28, 1926, p. 1. *Commerce Reports*, Jan. 3, 1927, p. 51.

November, 1926

4–19 LEAGUE OF NATIONS. Permanent Mandates Commission. Held tenth session at Geneva for consideration of annual reports, general questions and petitions. *L. N. M. S.*, Dec. 15, 1926, p. 274.

6 CZECHOSLOVAKIA—POLAND. Most-favored-nation commercial treaty, signed April 23, 1925, came into force. *Commerce Reports*, Dec. 13, 1926, p. 702.

6 FRANCE—GERMANY. Agreement concerning exchange of the products of several German and Saar industries signed in Berlin. *Times*, Nov. 8, 1926, p. 14. *Commerce Reports*, Nov. 22, 1926, p. 515. Text: *J. O.*, Nov. 30, 1926, p. 12564.

8 FRANCE—RUMANIA. Exchanged ratifications of treaty of friendship, convention of arbitration and conciliation, and protocol, signed at Paris, June 10, 1926. Text: *J. O.*, Jan. 20, 1927, p. 771. *Europe*, Feb. 12, 1927, p. 219. Promulgated on Jan. 20, 1927. Text: *E. E. P. S.*, Jan. 31, 1927, p. 234.

13 FINLAND—GERMANY. Exchanged ratifications of most-favored-nation commercial treaty signed June 26, 1926, effective Dec. 30, 1926. *Commerce Reports*, Jan. 17, 1927, p. 183.

14 *to Feb. 8, 1927* NICARAGUA. Adolfo Diaz inaugurated President on Nov. 14. On Nov. 17 the United States extended recognition to his government. Text: *Press notice*, Nov. 19, 1926. *U. S. Daily*, Nov. 24, 1926, p. 3. Shortly afterwards, Diaz government was recognized by Great Britain, France, Germany, Italy, Spain, Colombia, Honduras, and Salvador. On Dec. 2, Dr. Sacasa was inaugurated president of the "Constitutional government" and on Nov. 8 his government was recognized by Mexico. *N. Y. Times*, Dec. 9, 1926, p. 4. On Dec. 20, Diaz requested United States to send military mission to Nicaragua. On Dec. 23, force of marines landed in Nicaragua and established a neutral zone. Announced on Jan. 6 that arms embargo had been lifted and that 15 vessels and about 5,000 officers and enlisted men had been sent to Nicaraguan waters. On Jan. 10, President Coolidge sent message to Congress on Administration policy in Nicaragua, and its view of Mexico's part in the affair. Text: *Cong. Rec.*, Jan. 10, 1927, p. 1329. On Jan. 11, Foreign Minister Saenz of Mexico, published statement on Mexican policy in Nicaragua. Text: *N. Y. Times*, Jan. 12, 1927, p. 1. On Jan. 15, President Diaz proposed settlement of controversy. Text: *N. Y. Times*, Jan. 16, 1927, p. 1. On Feb. 3, Dr. Sacasa proposed a Central American conference to settle dispute. Text: *U. S. Daily*, Feb. 4, 1927, p. 2.

15–19 INTERNATIONAL ECONOMIC CONFERENCE. Preparatory committee held second and final session at Geneva, and adopted agenda of conference to be convened March 4, 1927. Text of agenda: *L. N. M. S.*, Dec. 15, 1926, p. 266. *L. N. Doc.* C. E. 1. 6.

16 GREECE—NEW ZEALAND. Exchanged notes granting reciprocal most-favored-nation treatment on imports. *Commerce Reports*, Jan. 3, 1927, p. 52.

17 SPAIN—UNITED STATES. Exchanged ratifications of convention for prevention of smuggling of intoxicating liquors, signed Feb. 10, 1926. *U. S. Treaty Series*, no. 749.

23 IMPERIAL CONFERENCE (London). Conference which opened on Oct. 19 came to an end on Nov. 23. On Nov. 19, the report of the Committee on Inter-Imperial Relations was adopted, establishing equality of Dominions of British Empire and change of title of the King. Text of report of Committee and Summary of proceedings: *Times*, Nov. 22–24, 1926, pp. 9, 15–16. *Cmd.* 2768.

24 FRANCE—ITALY. Additional protocol to railway convention of June 6, 1904, signed at Rome Dec. 23, 1923, promulgated by France. *J. O.*, Dec. 20–21, 1926, p. 13300.

25 GREECE—ITALY. Treaty of commerce and navigation, on basis of reciprocal most-favored-nation treatment, signed at Rome. *Commerce Reports*, Dec. 6, 1926, p. 641.

27 ALBANIA—ITALY. Five-year treaty of friendship, signed at Tirana on Nov. 27, registered at League on Feb. 8, 1927. Text: *E. E. P. S.*, Dec. 15, 1926; *Europe*, Jan. 8, 1927, p. 60.

28 EXTRATERRITORIALITY. Joint report of Commission on Extraterritoriality in China (Silas H. Strawn, chairman) published by State Department. Summary and recommendations: *N. Y. Times*, Nov. 29, 1926, p. 1.

29 GREECE—SWITZERLAND. Provisional commercial convention signed at Berne providing for general most-favored-nation treatment. *Commerce Reports*, Jan. 24, 1927, p. 245.

30 CZECHOSLOVAKIA—DENMARK. Treaty of arbitration signed. *Temps*, Dec. 2, 1926, p. 1.

30 DAWES PLAN. Agent General for Reparation Payments issued second annual report covering second year of operations, ending Aug. 31, 1926. *Federal Reserve B.*, Jan., 1927, p. 44.

30 GREAT BRITAIN—GREECE. Signed agreement respecting measurement of tonnage of merchant ships. *G. B. Treaty Series* no. 1 (1927), *Cmd.* 2789.

30 *to Jan. 17, 1927* TACNA—ARICA. In memorandum delivered to Chile and Peru on Nov. 30, Secretary Kellogg set forth new proposals for settlement, one of which was cession to Bolivia, by Chile and Peru, of rights in Tacna and Arica. Text: *U. S. Daily*, Dec. 2, 1926, p. 1. *Press notice*, Nov. 30, 1926. Bolivia indicated willingness to accept new proposals on Dec. 3, and Chile, on Dec. 4, agreed in principle. Kellogg replied to Peru's memorandum of Dec. 3. *Press notice* Dec. 11, 1926. On Dec. 11, State Department sent memorandum to Peru assuring protection to inhabitants of Tacna–Arica in transfer. *U. S. Daily*, Dec. 7 and 13, 1926. On Jan. 2, Peru rejected the proposal. Text: *Press notice*, Jan. 17, 1927. *U. S. Daily*, Jan. 19, 1927, p. 2.

December, 1926

1 AUSTRIA—CZECHOSLOVAKIA. All existing reciprocal tariff conventions denunciated by Austria, to expire March 1, 1927. *Commerce Reports*, Dec. 13, 1926, p. 702.

1 GERMANY—SWITZERLAND. Exchanged ratifications of commercial treaty signed June 14, 1926. *Commerce Reports*, Jan. 3, 1927, p. 52.

1 GREECE—TURKEY. Convention for regulation of abandoned properties in both countries signed in Athens. *Times*, Dec. 3, 1926, p. 13.

4 CHINA. Announced decision to terminate all unequal treaties and to refuse to submit the question of interpretation of Sino-Belgian treaty of 1865 to Permanent

Court of International Justice, preferring to submit the case to the League of Nations. *N. Y. Times*, Dec. 5, 1926, p. 2. *Cur. Hist.*, Feb., 1927, *25:* 697.

5–10 CONFERENCE ON CAUSE AND CURE OF WAR. Nine national women's organizations held second conference in Washington, endorsed World Court, favored cancellation of war debts to the United States, and urged amicable settlement of differences with Mexico. *Wash. Post.* Dec. 6–11, 1926, pp. 16 and 2. *N. Y. Times*, Dec. 11, 1926, p. 2; Dec. 19, 1926, VIII, 10.

6–10 LEAGUE OF NATIONS COUNCIL. Held 43d session to consider matters relating to Council's right of investigation; convocation of International Economic Conference on May 4, 1927; convocation of conference on International Relief Union on July 4, 1927; conference on supervision of private manufacture of war material in the autumn, 1927; banking and currency reform in Estonia, and financial restoration of Danzig; Bulgarian refugee settlement scheme; suppression of counterfeit currency; request for advisory opinion of Permanent Court of International Justice on jurisdiction of European Commission of the Danube. *L. N. M. S.*, Jan., 1927, p. 292.

7–13 CHEMICAL WARFARE PROTOCOL. On Dec. 7, Secretary Kellogg made public his reply to C. L. Parsons, secretary American Chemical Society, regarding poison gas protocol. *Press notice*, Dec. 9, 1926. On Dec. 9, report of Senate Committee on Foreign Relations, dated June 26, 1926, recommending ratification, was made public. Text: *U. S. Daily*, Dec. 13, 1926, p. 15. General Pershing's letter of Dec. 10, recommended ratification. Text: *U. S. Daily*, Dec. 14, 1926, p. 5. On Dec. 13, the Protocol was referred back to Senate Committee on Foreign Relations. *U. S. Daily*, Dec. 15, 1926, p. 5.

8 GERMANY—UNITED STATES. Arrangement embodied in exchange of notes providing for realization by the United States of its 2¼ per cent share in German payments under the Dawes plan. Text: *Press notice*, Feb. 5, 1927.

9 WOODROW WILSON FOUNDATION. Awarded medal and prize of $25,000 to Elihu Root for work in helping to found Permanent Court of International Justice. Text of speeches: *N. Y. Times*, Dec. 29, 1926, pp. 1, 14.

10 GREAT BRITAIN—GREECE. Exchanged ratifications of treaty of commerce and navigation signed July 16, 1926. *G. B. Treaty Series* no. 2 (1927), *Cmd.* 2790.

10 NOBEL PEACE PRIZE. Award for 1925 divided between Aristide Briand and Gustav Stresemann. Award for 1926 divided between Charles G. Dawes and Sir Austen Chamberlain. *N. Y. Times*, Dec. 11, 1926, p. 5.

12 *to Feb. 1, 1927* GERMAN DISARMAMENT. On Dec. 12, Foreign Ministers of France, Great Britain, Belgium, Italy, Japan and Germany reached decision on form of control over German armament to be exercised by the League when the Allied commission is dissolved on Jan. 31, 1927. *Times*, Dec. 13, 1926, p. 14. Summary of terms: *Cur. Hist.*, Jan., 1927, *25:* 595. On Jan. 22, 1927, agreement on German trade in war material was signed between German Government and Allied Military Control Commission. *N. Y. Times*, Jan. 23, 1927, p. 9. On Jan. 31, Conference of Ambassadors agreed on terms of settlement of question of fortifications in East Prussia and elsewhere, and approved provisional agreement on German trade in war material drafted by Allied and German experts in Berlin. Summary: *Times*, Feb. 3, 1927, p. 11. Text: *E. E. P. S.*, Feb. 15, 1927, p. 264.

13 REPARATION PAYMENTS. Secretary Kellogg's letter to President Coolidge regarding claims settlement agreement with Germany, transmitted to State Department, with copies of correspondence between the United States, Germany and Great Britain regarding reparation payments. *N. Y. Times*, Dec. 14, 1926, p. 4. Text: *U. S. Daily*, Dec. 15–22, 1926.

16 *to Feb. 16, 1927* China. Memorandum on British policy in China, addressed to Washington Treaty Powers on Dec. 16, proposed agreement for immediate grant of surtaxes promised to China in Chinese Customs Treaty of Feb. 6, 1922. Memorandum to United States on May 28, 1926, concerning British attitude toward Tariff conference made public on Dec. 28. Texts: *Times*, Dec. 28, 1926, p. 15. *E. E. P. S.*, Jan. 15, 1927, p. 202. *Cur. Hist.*, Feb., 1927, *25:* 753. Replies of Italy, Belgium and Denmark approved the suggestions, Italy, with reservations. France and Japan considered publication of proposals inopportune. On Jan. 26, United States government issued statement on its policy in China. *Times*, Jan. 27, 1927, p. 12. Text: *Cur. Hist.*, Mar. 1927, *25:* 903. British proposals communicated to Chinese authorities on Jan. 27–28. Text: *Times*, Feb. 3, 1927, p. 12. *Cur. Hist.*, Mar. 1927, *25:* 939. On Feb. 1, Foreign Minister of Cantonese government presented note to British diplomatic representative breaking off negotiations regarding future status of British concessions at Hankow. Text: *Times*, Feb. 3, p. 12. On Feb. 8, British Foreign Office sent statement to League Secretariat on British policy in China. Text: *Times*, Feb. 12, 1927, p. 11. China's reply was sent to League Secretariat on Feb. 16, including copy of note presented by Chinese Foreign Office to British Minister at Peking on Jan. 30, calling for immediate withdrawal of troops dispatched to Shanghai. *N. Y. Times*, Feb. 17, 1927, p. 4.

17 Belgium—Servia. Most-favored-nation commercial treaty signed. *Commerce Reports*, Dec. 27, 1926, p. 832.

18 Academy of Moral and Political Sciences. Albert I., king of the Belgians, took seat of foreign associate made vacant by the death of Woodrow Wilson. *N. Y. Times*, Dec. 19, 1926, p. 13.

18 France—Hungary. Commercial agreement signed in Paris, amending that of Oct. 13, 1925. *Times*, Dec. 21, 1926, p. 11.

19 War Debt Revision. 42 members of Faculty of Political Science of Columbia University joined in proposal for international debt and reparations conference to revise war debt settlements. Text: *N. Y. Times*, Dec. 20, 1926, p. 1. *Times*, Dec. 20, 1926, p. 11. *Cong. Rec.*, Jan. 8, 1927, p. 1317.

20 Panama—United States. Treaty signed July 28, 1926, replacing Taft agreement of 1903, made public. Text: *U. S. Daily*, Dec. 28–29, 1926. *Cong. Rec.*, Jan. 18, 1927, p. 1854. *Nation* (N. Y.) Jan. 5, 1927, p. 6.

20 Permanent Court of International Justice. Request of League Council for advisory opinion on competence of European Commission of the Danube registered on Dec. 20. President of the Court fixed dates for presentation of documents in Sino-Belgian controversy over abrogation of Treaty of 1865, in suit filed by Belgium. *L. N. M. S.*, Jan., 1927, p. 292.

22 Belgium—Mexico. Commercial agreement, denounced by Mexico on Oct. 5, 1925, to expire one year later, extended until April 5, 1927. *U. S. Daily*, Dec. 23, 1927, p. 1. *Commerce Reports*, Dec. 27, 1926, p. 832.

22 Philippine Islands. Col. C. A. Thompson's report of his survey of the Philippine Islands made public. Text: *U. S. Daily*, Dec. 24, 1926, pp. 9, 15. *69th Cong., 2d sess. Senate Doc.* 180.

29 Germany—Italy. Treaty of conciliation and arbitration signed at Rome. *Times*, Dec. 30, 1926, p. 10. Text: *N. Y. Times*, Jan. 16, 1927, p. 5. *E. E. P. S.*, Jan. 15, 1927, v. 2, no. 8/9.

29 Mexico. Announced that importation of firearms, ammunition, etc., had been prohibited by Mexico for one year. *U. S. Daily*, Dec. 30, 1926, p. 3.

31 Great Britain—Portugal. Agreement for settlement of war debt of Portugal to Great Britain signed at London. Text: *E. E. P. S.*, Feb. 15, 1927, p. 285.

January, 1927

1 Canada—Czechoslovakia. Trade treaty signed for 15 months from Jan. 1, 1927. *Commerce Reports*, Jan. 3, 1927, p. 51.

1 Mixed Court at Shanghai. Returned to Chinese control as the Shanghai Provisional Court, after 15 years under foreign authorities. *China Weekly R.*, Jan. 8, 1927, p. 147. *Times*, Jan. 1, 1927, p. 10.

3 Supreme Court. Decided boundary between Oklahoma and Texas. Text of opinion: *U. S. Daily*, Jan. 5, 1927, p. 12.

6 Belgium—Luxemburg—Portugal. Temporary most-favored-nation agreement signed at Lisbon. *Commerce Reports*, Feb. 28, 1927, p. 564.

10 Great Britain—Mexico. Treaty of commerce and amity due to expire on Dec. 22, 1926, extended until June 22, 1927. *U. S. Daily*, Jan. 11, 1927, p. 1.

10–25 Mexico—United States. In message to Congress on Jan. 10, President Coolidge stated views of administration on Mexico's part in Nicaraguan affair. On Jan. 11, Foreign Minister of Mexico issued statement concerning relations with the United States and reasons for recognizing Sacasa. Text: *N. Y. Times*, Jan. 12, 1927, p. 1. On Jan. 12, Secretary Kellogg published statement regarding alleged Bolshevist aims in Mexico and Latin America. Text: *U. S. Daily*, Jan. 12, 1927, pp. 1, 12 *Press notice*, Jan. 12, 1927. On Jan. 18, Senator Robinson introduced S. Res. 327 for arbitration of all controversies with Mexico, which was approved by Administration in statement by Secretary Kellogg. Text: *N. Y. Times*, Jan. 19, 1927, p. 1. On Jan. 20, Mexican Foreign Office announced acceptance in principle of proposal for arbitration. *N. Y. Times*, Jan. 21, 1927, p. 1. On Jan. 23, group of 101 professors in 43 colleges urged the United States to arbitrate controversy with Mexico. Text: *N. Y. Times*, Jan. 24, 1927, p. 2. *Cong. Rec.*, Jan. 27, 1927, p. 2366. On Jan. 25, S. Res. 327 was adopted in Senate by vote of 79–0. Text: *U. S. Daily*, Jan. 26, 1927, p. 1.

14 Tripartite Claims Commission. Announced that all claims, under treaty of Nov. 26, 1924, between United States, Austria and Hungary, must be in hands of Commission with evidence to support them, prior to Jan. 20, 1927. *Press notice*, Jan. 14, 1927.

18 Lausanne Treaty. General treaty between Turkey and the United States, signed Aug. 6, 1923, rejected by United States Senate by a vote of 50 to 34. *U. S. Daily*, Jan. 19, 1927, p. 1.

22 Czechoslovakia—Germany. Aviation agreement signed at Prague. *Times*, Jan. 24, 1927, p. 11.

24 Mixed Claims Commission (U. S. and Germany). Announced awards in 428 claims totaling over $3,707,000, and dismissal of claims in 339 cases, at meetings from Nov., 1926, to Jan. 5, 1927. *U. S. Daily*, Jan. 24, 1927, p. 1.

26 China—United States. State Department issued notice that United States was willing to negotiate with China on entire subject of tariff and extraterritoriality, or to negotiate on behalf of the United States alone. Text: *U. S. Daily*, Jan. 27, 1927, p. 1. *Cong. Rec.*, Feb. 21, 1927, p. 4348. On Jan. 28, House Committee on Foreign Affairs reported favorably H. Con. Res. 46 (revision of treaties with China). Text: *69th Cong., 2d sess., House Rept.* 1891.

26 Panama—United States. Consideration of treaty of July 28, 1926, suspended by Panaman National Assembly for re-negotiation. *Times*, Jan. 28, 1927, p. 13. *Cur. Hist.*, March, 1927, *25:* 920.

29 ARBITRAL TRIBUNAL OF INTERPRETATION. Announced second award, ruling that annuities prescribed by Dawes Plan, as payable to Agent General for Reparation Payments, do not cover compensation paid since Sept. 1, 1924, or which may be paid in future, by the Reich to German nationals in respect of the retention, liquidation, or transfer of their property, rights, or interests, such payments being made in execution of Treaty of Versailles. *Times*, Jan. 31, 1927, p. 11.

February, 1927

1 INTERALLIED MILITARY CONTROL COMMISSION. Terminated its activities in Berlin on Jan. 31, control of German armament passing to the Council of the League of Nations. *N. Y. Times*, Feb. 1, 1927, p. 29.

3 ARMAMENT INVESTIGATION IN FOREIGN COUNTRIES. Rules governing League of Nations in its new duty of supervising arms control in Germany, Austria, Hungary and Bulgaria, made public. Text: *U. S. Daily*, Feb. 3–4, 1927.

3–5 CONFERENCE ON INTERNATIONAL RELATIONS AND AMERICAN DIPLOMACY. Held at Louisiana State University. *Amer. Pol. Sci. Rev.*, Feb., 1927, p. 148.

3 PHILLIPS, WILLIAM. Appointed first United States Minister to Canada. *N. Y. Times*, Feb. 4, 1927, p. 7.

5 ESTONIA—LATVIA. Customs agreement signed. *Commerce Reports*, Feb. 14, 1927, p. 435.

5 GERMAN PAYMENTS TO AMERICA. State Department announced arrangement of Dec. 8, 1926, whereby German firms doing business in United States, would deposit monthly sums in dollars in the Federal Reserve Bank of New York to the amount that would be credited in Germany to the United States for reparation payments, such firms to be reimbursed in reichmarks in Germany. *Cur. Hist.*, March, 1927, *25:* 912.

6 CHINA—UNITED STATES. State Department announced proposal to China for elimination of international settlement of Shanghai from zone of warlike activities. Text: *U. S. Daily*, Feb. 7, 1927, p. 6. *Press notice*, Feb. 5, 1927.

9 UNITED STATES AND THE WORLD COURT. British government having declined to accept American reservations in World court, the United States Senate by vote of 59 to 30 rejected S. Res. 282 to rescind action by which it assented to American membership. *N. Y. Times*, Feb. 10, 1927, p. 1. *U. S. Daily*, Feb. 10, 1927, p. 1.

9 WORLD WAR FOREIGN DEBT COMMISSION. After negotiating agreements with 13 countries calling for payment of $11,522,354,000 to the United States, the Commission went out of existence by automatic legal termination. Table of settlements: *N. Y. Times*, Feb. 10, 1927, p. 3. *Cong. Rec.*, Feb. 9, 1927, p. 3439.

10 NAVAL LIMITATION CONFERENCE. Appeal to Great Britain, France, Italy, and Japan to meet America in conference at Geneva for further limitation of naval armaments, communicated by Pres. Coolidge, who sent text to Congress with message. *Cong. Rec.*, Feb. 10, 1927, p. 3487. *69 th Cong., 2d sess. House Doc.* 703. Text of note: *U. S. Daily*, Feb. 11, 1927, p. 2. *Cur. Hist.*, March 1927, *25:* 912.

12 DISARMAMENT CONFERENCE. American participation in work of Preparatory Commission for Disarmament Conference agreed to by House Committee on Foreign Affairs. Text of H. J. Res. 352: *U. S. Daily*, Feb. 14, 1927, p. 2. *69th Cong., 2d sess. House Report*, 2066.

INTERNATIONAL CONVENTIONS

BULGARIAN REFUGEES. Geneva, Sept. 8, 1926.
Ratification: Bulgaria. Nov. 23, 1926. *L. N. O. J.*, Dec., 1926, p. 1599.

CUSTOMS DOCUMENTS. Santiago, May 3, 1923.
Proclamation: United States. Jan. 12, 1927. *U. S. Treaty Series*, no. 753.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.
Promulgation: France. Dec. 5, 1926. *J. O.*, Dec. 11, 1926, p. 12892.
Ratifications: Morocco and Tunis. Nov. 8, 1926. *L. N. O. J.*, Dec., 1926, p. 1600.

EIGHT-HOUR DAY. Washington, Nov. 28, 1919.
Ratification: Belgium. Sept. 9, 1926. *I. L. O. B.*, Sept. 30, 1926, p. 321.

EPIZOÖTIC OFFICE. Paris, Jan. 25, 1924.
Ratification: Tunis. Feb. 13, 1925. *J. O.*, Jan. 12, 1927, p. 466.

GERMAN PEACE TREATY. Versailles, June 28, 1919. Amendments to Art. 393. Geneva, Nov. 2, 1922.
Ratification deposited: Portugal. Sept. 13, 1926. *I. L. O. B.*, Dec. 15, 1926, p. 352.

GREEK REFUGEES. Declaration on Protocol Modifications. Geneva, Sept. 25, 1924.
Signatures: Great Britain, France, Italy. *L. N. O. J.*, Nov., 1926, p. 1504.

LOCARNO. Treaty of Mutual Guarantee. Dec. 1, 1925.
Ratifications deposited: Belgium, France, Germany, Italy. Oct. 16, 1925. *G. B. Treaty Series* no. 28 (1926), *Cmd.* 2764.

MARITIME PORTS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Ratification: Switzerland. Oct. 23, 1926. *L. N. O. J.*, Nov., 1926, p. 1493.

MERCHANDISE CLASSIFICATION. Santiago, May 3, 1923.
Proclamation: United States. Jan. 12, 1927. *U. S. Treaty Series*, no. 754.

NAVIGABLE WATERWAYS CONVENTION. Barcelona, April 20, 1921.
Ratification: France. Dec. 20, 1926. *J. O.*, Dec. 23, 1926, p. 13386.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.
Accessions: Nigeria [and 35 other small nations] Nov. 3, 1926. *L. N. O. J.*, Dec., 1926, p. 1599.

OCCUPATIONAL DISEASES. Geneva, June 10, 1925.
Ratification deposited: Great Britain. Oct. 6, 1926. *L. N. O. J.*, Nov., 1926, p. 1485.

OPIUM CONVENTION. Geneva, Feb. 19, 1925.
Ratification deposited: Salvador. *L. N. M. S.*, Jan., 1927, p. 298.

PAN AMERICAN ARBITRATION. Santiago, May 3, 1923.
Proclamation: United States. Jan. 12, 1927. *U. S. Treaty Series*, no. 752.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.
Adhesion: Guatemala. Dec. 17, 1926. *L. N. M. S.*, Jan., 1927, p. 293.
Adhesion (renewed):
Austria: Jan. 12, 1927. *L. N. M. S.*, Feb., 1927, p. 4.
Netherlands. Sept. 2, 1926.
Norway. Oct. 3, 1926. *L. N. O. J.*, Nov. 15, 1926, p. 244.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of Signature. Geneva, Dec. 16, 1920.
Adhesion:
Germany. Dec. 10, 1926.
Guatemala. Dec. 17, 1926. *L. N. M. S.*, Jan., 1927, p. 293.

RAILWAYS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Ratification: Japan. Sept. 30, 1926. *L. N. O. J.*, Nov., 1926, p. 1491.

SLAVERY CONVENTION. Geneva, Sept. 25, 1926.
Adhesion: France. Dec. 11, 1926. *L. N. M. S.*, Jan., 1927, p. 298.
Text: U. S. Daily, Oct. 26–27, 1926, p. 3. *L. N. O. J.*, Dec., 1926, p. 1655.

TRADE-MARKS. Santiago, April 28, 1923.
Proclamation: United States. Jan. 12, 1927. *U. S. Treaty Series*, no. 751.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.
Promulgation: France. Dec. 2, 1926. *J. O.*, Dec. 5, 1926, p. 12757.

WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875. Revision, Sèvres, Oct. 6, 1921.
Ratifications deposited:
Austria. Dec. 15, 1926. *J. O.*, Dec. 26–28, 1926, p. 13522.
Spain. Dec. 31, 1926. *J. O.*, Jan. 12, 1927, p. 466.

WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.
Promulgation: France. Dec. 3, 1926. *J. O.*, Dec. 5, 1926, p. 12755.

WINE BUREAU. Paris, Nov. 29, 1924.
Ratification deposited: Spain. Dec. 31, 1926. *J. O.*, Jan. 12, 1927, p. 466.

WORKMEN'S COMPENSATION FOR ACCIDENTS. Geneva, June 10, 1925.
Ratification deposited: Sweden. Sept. 8, 1926. *L. N. O. J.*, Nov., 1926, p. 1485.

WORKMEN'S COMPENSATION FOR ACCIDENTS (Equality of Treatment). Geneva, June 5, 1925.
Ratifications deposited:
Great Britain. Oct. 6, 1926.
Sweden. Sept. 8, 1926. *L. N. O. J.*, Nov., 1926, p. 1485.

WORKMEN'S COMPENSATION FOR OCCUPATIONAL DISEASES. Geneva, June 10, 1925.
Ratification: Great Britain. Sept. 17, 1926. *I. L. O. B.*, Dec., 1926, p. 366.

WORKMEN'S COMPENSATION IN AGRICULTURE. Geneva, Nov. 12, 1921.
Ratification: Netherlands. Aug. 20, 1926. *L. N. O. J.*, Nov., 1926, p. 1483.

WORLD COURT RESERVATIONS CONFERENCE. Final Act. Geneva, Sept. 23, 1926.
Text and signatures: L. N. O. J., Nov., 1926, p. 1505, 1578.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

ARBITRAL AWARD

PRONOUNCED IN EXECUTION OF THE TERMS OF SUBMISSION, SIGNED IN BERLIN ON APRIL 26, 1926, BETWEEN THE GERMAN GOVERNMENT AND THE COMMISSIONER OF CONTROLLED REVENUES IN REGARD TO THE INTERPRETATION OF ARTICLE 11 OF THE LONDON PROTOCOL OF AUGUST 9, 1924.*

June 23, 1926

Interpretation of the Dawes Plan and the London agreement carrying it into effect.

Under the terms of Art. 11 of Chap. III of the Protocol annexed to the agreement concluded in London August 9, 1924, between the German Government and the Reparation Commission, "concerning the contributions to be made from the German budget and the institution of control over the revenues from customs, the taxes on spirits, tobacco, beer and sugar," the Commissioner of Controlled Revenues has the power to decline to consent to a reduction in the rate of an assigned revenue proposed by the German Government, even if there is no falling off in the yield of the revenues as such falling off is defined in Art. 7, Chap. III, of the Control Protocol, and even if, in addition, no decrease is noted in the returns from the particular revenues as to which a reduction in rate is proposed.

If the assigned revenues are to furnish an adequate security for budgetary payments and collateral for others, there is every reason to stipulate that these securities shall not be diminished without the prior consent of the creditors' representative. A system of control established for the integral preservation of a security must logically see to it that the intrinsic value of the security does not decrease.

The obligation to obtain the consent of the Commissioner even in normal circumstances cannot be considered as running counter to the desire of the Committee of Experts to reject as inopportune, apart from certain exceptional circumstances, any system which would directly or indirectly mean virtual control of all the receipts and payments of Germany. Such consent in no way implies intervention on the part of the Commissioner in the administration of the controlled revenues or even in financial policy in general: its only object is to see that the "tangible and productive" guarantee in no way loses its value.

INTRODUCTION

Between the German Government and the Commissioner of Controlled Revenues a difference of opinion has arisen in regard to the interpretation of Article 11 of the Protocol annexed to the Agreement concluded in London between the German Government and the Reparation Commission under date of August 9, 1924.

The parties, being unable to come to an agreement, decided in conformity with Article 14 of the said Protocol to submit their divergence of opinion to arbitration in accordance with the Terms of Submission dated April 26, 1926, and to request the Chairman at the time of the Permanent Court of International Justice to appoint an arbitrator.

In virtue of this application, the Chairman on May 3, 1926 appointed the undersigned as arbitrator.

The above-mentioned Terms of Submission contain the following provisions:

* Translation 3237 from the French, furnished by the office of the Arbitrator. Headnotes inserted by the Managing Editor of the JOURNAL.

of a divergence of opinion between the Commissioner of Controlled Revenues and the German Government as to the interpretation of Article 11 of Chapter III, of Annex I to the agreement between the Reparation Commission and the German Government executed at London, August 9, 1924.

Whereas a difference of opinion has arisen between the Commissioner of Controlled Revenues and the German Government with respect to the interpretation of Article 11 of Chapter III of Annex I to the Agreement between the Reparation Commission and the German Government executed at London, August 9, 1924, which contains the "Protocol Concerning the Contributions to be Made from the German Budget and the Institution of Control over the Revenues from Customs, the Taxes on Spirits, Tobacco, Beer and Sugar" (hereinafter referred to as the Control Protocol), and

Whereas by paragraph 14 of Chapter III of said Control Protocol any such divergence of opinion shall at the request of the German Government or of the Commissioner of Controlled Revenues be decided by an arbitrator to be appointed by the President for the time being of the Permanent Court of International Justice at the Hague, and

Whereas the Commissioner of Controlled Revenues and the German Government have mutually agreed to arbitrate the divergence of opinion hereinafter set forth, and have taken steps to initiate the appointment of an arbitrator in accordance with the provisions of the Control Protocol above referred to:

Now, it is hereby agreed between Sir Andrew McFadyean, the Commissioner of Controlled Revenues, on the one hand, and the German Government, represented by the *Reichsfinanzminister* Dr. Reinhold, on the other hand, as follows:

1. The question for the determination of the arbitrator is the following:

> Under the terms of Article 11 of Chapter III of the Control Protocol, as read with the Protocol as a whole, is the Commissioner of Controlled Revenues without power to decline to consent to a reduction in the rate of an assigned revenue proposed by the German Government unless and until the special conditions of fact set forth in Article 7 of Chapter III of the Control Protocol are in existence, *i.e.*, a falling off in the yield of the revenues as such falling off is defined in the first paragraph (a), (b) and (c) of said Article 7, and unless, in addition, there is a decrease in the returns from the particular revenues as to which a reduction in rate is proposed.*

2. Any additional or secondary question arising out of the interpretation or application of said Article 11 shall be excluded from consideration or discussion during the present arbitration.

3. The procedure shall be as follows:

(a) The Commissioner of Controlled Revenues and the German Government shall on May 8, 1926, submit their cases to the arbitrator duly named, and each side shall simultaneously deliver six (6) copies of its case to the other party.

(b) The Commissioner of Controlled Revenues and the German Government shall on May 24, 1926, submit to the arbitrator their replies to the respective cases, and each side shall simultaneously deliver six (6) copies of its reply to the other party unless one or both parties has waived his right to make a reply.

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* In the German text the question is reversed, as follows:

Ist der Kommissar für die verpfändeten Einnahmen nach den Bestimmungen der Ziffer 11 des Kapitels III des Kontrollprotokolls, im Zusammenhang mit dem Protokoll als ganzes gelesen, berechtigt (entitled), die von der Deutschen Regierung beantragte Einwilligung zur Herabsetzung des Satzes einer verpfändeten Abgabe zu verweigern, selbst wenn nicht und solange nicht die in Ziffer 7 des Kapitels III des Kontrollprotokolls bezeichneten besonderen tatsächlichen Voraussetzungen bestehen, d. h. der Ertrag der Einnahmen, wie es in dem ersten Absatz Ziffer a, b, c der genannten Ziffer 7 beschrieben ist, zurückgeht, und wenn nicht ausserdem die Einkünfte aus den besonderen Einnahmen, deren Satz herabgesetz werden soll, zurückgehen.

(c) The Commissioner of Controlled Revenues and the German Government shall respectively have the right to submit to the arbitrator on June 7, 1926, a rejoinder, and if such right is exercised by either or both parties at least six (6) copies of the said rejoinders will be delivered to the opposing party simultaneously with its submission to the arbitrator.

(d) There will be no further written pleadings and no oral debates unless the arbitrator, acting on his own motion, so requires.

4. The written pleadings shall be filed with the arbitrator at his domicile, and the oral debates, if any, shall take place at the domicile of the arbitrator unless the arbitrator shall otherwise direct.

5. The dates above fixed may be advanced or extended by the agreement of the parties, or may be extended by a decision of the arbitrator.

6. The written proceedings may be in English, French or German; in case of proceedings in English or German a French translation shall be delivered as soon as possible. Oral debates, if any, may be conducted either in French, English or German, subject to the right of either side, or of the arbitrator, to require a translation.

7. The proceedings in this arbitration shall be governed by the third Chapter of The Hague Convention of 18th October, 1907, except in so far as the same may be modified by this Agreement, and in particular Article 85 of The Hague Convention shall apply to these proceedings and each party shall pay its own expenses and an equal share of those of the Tribunal, no question being raised as to a credit against the Annuities prescribed by the Experts' Plan.

8. Done in English and German, both texts being authoritative.

Dated Berlin, 26th April, 1926.

The Commissioner of Controlled Revenues:
(Signed) ANDREW MCFADYEAN.

For the German Government:
(Signed) DR. REINHOLD.

On May 8, 1926 the parties submitted their respective cases to the arbitrator; on May 26 they transmitted their replies to the cases submitted and on June 7 they sent in rejoinders to the arbitrator.

The arbitrator did not consider it necessary to claim the submission of other written pleadings or to require oral debates.

POINT OF VIEW OF THE GERMAN GOVERNMENT

In its memorandum of May 8, 1926, the German Government recalls the views of the Committee of Experts (Dawes Committee) on the system of assigned revenues and of the control of such revenues, that is, that "so long as the revenues are sufficient, with an adequate margin, to meet the annual charges" and "normally," "it would not be the duty of the Commissioner to interfere with the details of control." It points out that the Protocol further defines the expressions "adequate margin" and "normally" by stipulating under what conditions the ordinary rights of the Commissioner will be extended and what the nature of these rights will be in various cases; Article 6 enumerates the rights which the Commissioner possesses as from the coming into force of the Experts' Plan; Article 7 explains the conditions under which the Commissioner's rights may be extended and the scope of such extended rights, while Articles 8 to 10 grant the Commissioner still more

extended rights in the event of other conditions being present. Article 11 contains a provision which is defined in Article 7 for the second stage of control, while for the third stage of control (Article 9 of the Protocol) the provision becomes immediately effective in the absence of special regulations. It must therefore be found that the article contains a special regulation for the question of reductions in rates in the assigned revenues.

Except on the assumption that Articles 7 and 11 contain an insoluble contradiction, it must be admitted that the general conditions of Article 7 must also exist for the application of Article 11; if this article gave the Commissioner a right which was his from the outset, it would not be in harmony with the structure of the Protocol. On the contrary, in the view of the German Government, Article 7 gives the Commissioner a right to veto the reduction of rates (together with other rights) where the conditions specified under (a), (b) and (c) are present, while on the other hand Article 11 stipulates that the German Government shall obtain the consent of the Commissioner, if a reduction of the rates of the assigned taxes is contemplated; in the latter case therefore the Commissioner is relieved of the obligation of considering whether a proposed alteration of the taxation claim represents a reduction of the rates within the meaning of Article 11, and his work is thereby technically facilitated.

According to this view there can be no question of exercising the right given under Article 11, except in the case of taxes where the decline in revenue contemplated by Article 7 is present.

The point of view of the German Government, developed on these lines, is also in harmony with the Experts' Plan which enunciates the principle that the Commissioner is not normally obliged "to insist on the exact tariffs which would, in his view, secure the utmost yield."

The Plan further contemplates that, in the special case of reduction of rates, the Commissioner shall not give the requisite consent until the Advisory Committee composed of representatives of the Allied countries concerned has had opportunity to consider the proposal and has approved it by a majority decision. It would not be intelligible that the Experts should have proposed such a cumbrous procedure for normal times, when the risk that the revenues will become inadequate is slight. The Plan further provides that the life of Germany shall not be obstructed by foreign organizations, and it permits only such foreign organizations as are essential for the effective execution of the Plan itself. Such far-reaching intervention in the taxation policy of the Reich as that claimed by the Commissioner would have too powerful an effect on the freedom of movement which the execution of the Plan presupposes.

In its reply the German Government first recalls the purposes served by the controlled revenues and protests against the alleged attempt on the part of the Commissioner to establish a close connection between his right of approval in the matter of rates and possible increases in the payments made by

Germany; it further protests against the impression given in his case that the controlled revenues are assigned as security for a total payment of at least 2,210,000,000 gold marks during the normal year, to which a further sum of 250 millions during the third and fourth reparation years may be added. The Government holds that, under the system of the Plan and under the special provisions of the Control Protocol, the payment of additional sums is rather to be based on the actual development of the controlled revenues as that development may take place *without action on the part of the Commissioner*. According to the Plan, the Experts established the principle that it was henceforward for Germany alone according to her own circumstances to adopt methods for obtaining the desired result. The object of control in the moratory years, when no Budget contribution for which the controlled revenues are assigned as security is due, is likewise not to obtain the highest possible supplementary contribution for the third and fourth reparation years. Any policy of the Commissioner, which is designed to influence the rates of the controlled revenues in the direction of an increase of German reparation payments, would be a most serious breach of the Experts' Plan and of the Protocol.

The German Government does not accept the arguments of the Commissioner in regard to the force of general legal principles for the interpretation of the article in question. Even in the internal public law of a state the application of the legal maxims of private law is by no means universally admissible; *a fortiori* the application of the principles of civil law in the sphere of international public law calls for very great caution; the rights of the creditor states of the pledge are dealt with exclusively and exhaustively in the Control Protocol alone. It is an admitted principle of international law that all restrictions of sovereignty must be narrowly interpreted and that they can only be recognized if they are clearly expressed; analogies are thus excluded where the restriction of sovereignty is under consideration. It is further admitted in international law that, where there are several possibilities, that interpretation is to be chosen which gives the least advantage to the party for whose advantage the provision in question was made. The Commissioner claims an absolute right to refuse his consent, even when (that is to say) there can be no question of endangering his rights; a further point is that, especially in the case of indirect taxes, a reduction in rates may have the object, or the result, of maintaining or even increasing the taxation returns. In reality therefore the Commissioner's case is not even supported by general legal principles.

The Government then discusses the Protocol, the contents of which are of decisive importance for the question in dispute: there are only two interpretations which give reasonable conclusions; either Article 11 must be considered as a legal maxim, the authoritative form of which for the second stage or phase of control is contained in Article 7 (with the result that the special provisions of Article 7 apply only to the second stage), while in the nature of

things it does not refer to the first stage and is immediately effective for the third stage. Or Article 11 must be looked upon as a special regulation for the question of reduction of the rates of the controlled taxes, which, however, unless it is assumed that the provisions of the Control Protocol contain an insoluble contradiction, can only apply for the second and third stages of control, and not for the first stage; it follows under this interpretation also that for the second stage of control the right under Article 11 can only be exercised with reference to taxes where the necessary falling off of revenue has taken place. For it would be incomprehensible if the further restriction of the sovereignty of Germany under Article 11 applied even in the first stage of control, while the Control Protocol considers it necessary in Article 7 to make less far-reaching rights of the Commissioner on the same point dependent on exactly defined conditions, that is, the existence of the second stage of control. It is a matter of indifference therefore whether under Article 11 the German Government is obliged in all stages of control for formal reasons to apply for the consent of the Commissioner, or whether the German Government only needs to apply for the consent of the Commissioner if, according to which of the two views put forward by the German Government is preferred, the conditions of the second stage of control alone or the conditions of the third stage of control (and consequently also those of the second stage of control) are present. The conclusion is inevitable that the Commissioner is obliged to give his consent, unless the conditions of the second, or (possibly) also of the third, stage of control are present. Otherwise the irreconcilable contradiction between the provisions of the Protocol, to which reference has more than once been made, would again appear.

If it were true that the provisions of Article 11 should apply even to the first stage of control, they would have been systematically included in Article 6. From the point of view which alone is justifiable (that is, that it is necessary to know what the relation in the matter of rates is between Article 11 and the other provisions of the Control Protocol), it is clear that Article 11 has its proper meaning since to a certain extent it extends the rights of the Commissioner in regard to rates. Moreover there is no inconsistency with the principles of the Experts' Plan in not admitting during the first stage of control the right of consent of the Commissioner, as was already shown in the first case of the German Government. Moreover the yield from the controlled revenues leaves a considerable margin over and above the payments; a reserve fund of 100 million gold marks has been constituted; provision is made for a wide margin, and failure to reach this margin means that the second stage of control comes into force; finally it is not at the discretion of the Government to pursue a taxation policy calculated to prejudice the rights of the reparation creditors; taxes such as those assigned as security are dependent on a number of factors which lie outside the Government's sphere of influence. From the standpoint of the reparation creditors, it would mean

destroying confidence in the Plan itself if every action taken by the Government was viewed with mistrust.

The new laws of August 17 and 18, 1925 (which respectively amend the customs duties and increase the taxes on beer and tobacco) also strongly support the argument that in the normal course of things there is no need to give the Commissioner any right to intervene in the matter of rates.

Although the Experts' Plan contains a sentence to the effect that the German Government should be asked not to reduce the rates of the assigned revenues without the consent of the Commissioner, it also stipulates that the Commissioner would not normally be obliged to insist on the exact tariffs which would in his view secure the utmost yield.

The Government again draws attention to the creation of the cumbrous machinery involved by an advisory committee, which would impede the rapid working of the necessary taxation measures.

In regard to international practice, the German Government maintains that in the sphere of financial control no such practice has as yet been able to be formed: there are only a number of individual cases, certain of which the reply reviews (Greece, Egypt and Austria); it is not possible to deduce from these examples general rules, since no standard system of financial control exists.

In its rejoinder the German Government corrects some arguments contained in the Commissioner's reply:

1. The Government has never maintained that the authoritative document, the interpretation of which is in question, is the Experts' Plan and not the Protocol.

2. The Government has not maintained that, where the Experts' Plan is concerned, its case is almost entirely based on the following sentence of the Experts' Plan:

> But since the interests of the Allies are not affected so long as the revenues are sufficient with an adequate margin to meet the annual charges, it would not be his (the Commissioner's) duty in such circumstances to interfere with the details of control.

The Government has rather endeavored to draw the meaning and bearing of the Experts' Plan, in so far as it applies to the present dispute, from the whole of the passages concerned. The sentence: "The German Government should be asked not to reduce the rate of the assigned revenues without the consent of the Commissioner" does not form part of the rights indicated in paragraphs (a) to (e) for the normal stage of control (Part II, Section IV); it does not immediately follow these paragraphs but appears after another sentence dealing with the constitution of the Control Body, and therefore not with the system of technical control.

3. Moreover the Government feels bound to point out that in this connection the Commissioner, and not the Government, has failed to take into account the general context of the Experts' Plan.

4. The German Government does not maintain that it is an essential part of the Experts' Plan to exclude without exception all intervention by foreign organizations in German affairs.

5. In regard to the connection between the advisory committee and the present dispute, the Government refers to the arguments put forward in its previous memoranda.

In regard to the Protocol the Government draws attention to the following points:

1. The assertion of the German Government that, if the Commissioner's view is the right one, Article 11 is in the wrong place cannot be refuted on the ground that Article 12 is not also wrongly placed; Article 11 contains a restriction of German sovereignty, while Article 12 upholds that sovereignty.

2. In holding that the German interpretation practically cancels his rights under letters (b) and (c) of Article 7 of the Protocol, the Commissioner entirely mistakes the meaning of the article: letters (b) and (c) do not make the application of the second stage of control dependent on the unmodified condition only of rates, but rather on the unmodified condition of "the relevant legislation and more particularly the tariffs," so that the Commissioner, at least during the first stage of control, would not be able to intervene in any way, even apart from the question of rates in connection with legislative measures calculated possibly or inevitably to produce a reduction in yield. Consequently it would have been useless to make the reduction of rates in the first stage of control dependent on the consent of the Commissioner, if it had been intended to make it impossible for the German Government by its own measures to prevent the application of the second stage of control. The provisions of the Protocol must be interpreted from the point of view of mutual confidence and of the interest of the German Government itself which forms the basis of the Experts' Plan.

3. The German Government has never maintained that the object of Article 11 is to relieve the Commissioner of the necessity for fulfilling his difficult task in full: Article 11 merely makes the Commissioner's duties easier, in cases where in the opinion of the German Government a reduction in rates is involved.

The Government concludes therefore by asking the arbitrator to answer in the negative the question contained in the terms of submission to the arbitrator (German text).

Point of View of the Commissioner of Controlled Revenues

The Commissioner of Controlled Revenues takes the view in his case that there is no warrant for arbitrarily adding a limitation to the categorical and unrestricted terms of Article 11: under the terms of this article he is entitled to exercise his discretion in protecting the interests of the creditors, "particularly" if and when he fears that the proposed reduction may endanger the future obligations for which the controlled revenues are security. He recalls

the prime practical importance of the controlled revenues as a security for the pecuniary execution of the Experts' Plan in all its parts—for the international loan, for the budgetary contributions, and for the service of the railway and industrial bonds: the revenues are a security not merely for current obligations but above all for future years. The agreement constituting the pledge, which fixes the status of the relationship of the parties, must be read, where not clearly inconsistent, in the light of the general law relative to pledges: it is confidently asserted to be a general principle of comparative jurisprudence that the value or sufficiency of property assigned as security cannot, without the pledgee's assent, be modified or diminished by the pledgor in a manner such as to prejudice the pledgee's protection.

Articles 11 and 12 of the Protocol are utterly general in their nature: they make no reference to, and have no textual connection with, Articles 6 to 10; on the contrary, Articles 11 and 12 are concerned with limitations on the freedom of action of the pledgor and of the pledgee's representatives. The general structure of the Protocol in itself negatives the German thesis that Article 11 is in some way contained in, or limited by, Article 7 to which it in no way refers. The language of Article 11 contains no intimation that the Commissioner has no freedom of discretion in granting or refusing his consent and the article applies during all circumstances whether normal, abnormal or extreme.

If it be true that Article 11 is to be read in subordination to Article 7, then Article 11 becomes empty of practical meaning since the powers contained in Article 7 are much wider in their scope than those granted by Article 11. In the Commissioner's view, Article 11 gives him the right to prevent the German Government from taking measures likely to produce an unfavorable situation, even though the disaster has not yet arrived, by analogy with the provisions of Anglo-Saxon and German mortgage laws, whereby the mortgagee has the right to institute precautionary measures to ward off any danger to his security *before* it has arisen.

The Commissioner argues that the construction sustained by the German Government is contradictory to the text of the Protocol, to the ordinary law of pledge and also to the spirit and fundamental purpose of the Protocol, which was designed to give substantial security and effective guarantee.

The conclusions to be drawn from the categoric and plain provisions of the Experts' Plan (Part II, Chapter IV) are as follows:

(a) That the language intended to describe a general unqualified prohibition upon the German Government, applicable to all cases of a reduction in the rate of an assigned revenue, and a general unqualified prohibition upon the Control Commissioner with regard to interfering in the German Government's tariff policy.

(b) That the Experts put the greatest possible stress on their condition that the Government should not reduce a rate without the consent of the Commissioner, because they go on to say that this system "makes it un-

necessary in relation to the problem of security to insist on an increase in any particular tax."

(c) That, in absolute opposition to the German view, the Plan proposed to put fetters on the Commissioner even when he was ready to give his consent, that is, to require that a majority of a consultative committee should agree that he might give his consent (the fact that this committee has in practice been abandoned has no bearing on the clear construction of the Plan to the effect that the Experts wanted to place safeguards around the granting of consent rather than to make that consent obligatory in all except abnormal circumstances).

If Germany could alter the level (*le taux*) against the Commissioner's wishes, the security would become illusory, contrary to the object of the Experts' Plan, which deals with the prior consent of the Commissioner in the event of a reduction in rate in the section which describes habitual control "in the ordinary course."

Finally, when a sovereign state assigns certain specific revenues as security for a payment, the agreements executed invariably contain a clause to the effect that the assignor state shall not take any steps reducing the rates or yield of the revenues assigned without the prior consent of the creditors or of their control representative (Austria, Hungary, Turkey, Mexico).

The Commissioner not only does not believe that such a derogation is clearly stated in the Protocol but, precisely the contrary, considers that Article 11 means what it literally says and is thus in harmony with international practice, with the Experts' Plan, with the comparative law of pledge and with the obvious necessities of the case.

In his reply to the case of the German Government, the Commissioner discusses the five arguments on which in his opinion the German contention is based.

1. After recalling that the Protocol is the authoritative document and that the Experts' Plan has to be used as a secondary aid on doubtful points, he argues that the language and principles of the Experts' Plan which tend to restrict action on the part of the Commissioner do not deny him a right of control in regard to reductions in rates even in the ordinary course, but only the power to intervene in the details of administration or to insist on the establishment or increase of certain rates, and that if the Experts' Plan aimed at minimizing the obstruction of German economy by foreign organizations, an exception was made for the systems of control therein provided.

2. Secondly, the Commissioner points out that the proposal to establish a consultative committee, mentioned in the Experts' Report, does not justify the view that the Experts would never have suggested a similar procedure in normal times, since the suggestion that the procedure would be cumbersome is purely gratuitous and purely speculative; the true bearing of the consultative committee provisions of the Plan were indicated in the Commissioner's case dated May 8, 1926; in any case the committee does not exist.

3. In the third place, the Commissioner repeats, against the contention of the German Government, that if Article 11 contemplated a right granted to the Commissioner from the beginning of the operation of the Plan, it would be out of harmony with the general structure of the Control Protocol, that, whereas Articles 7 to 10 deal with a *grant of powers* to the Commissioner, Articles 11 and 12 limit respectively the action of the German Government and that of the Commissioner; the position of Article 11 is thus perfectly natural. If in accordance with the German contention Article 11 is applicable only in exceptional circumstances, the inevitable result would be that Article 12 could likewise apply only in abnormal circumstances, in view of the general language, the immediate juxtaposition and the common origin of the two articles; in the case of Article 12 this hypothesis leads to a clear absurdity.

4. Fourthly, there would be, the German case believes, an insoluble contradiction between Articles 7 and 11 if the Commissioner were to be given in Article 11 the right, generally, to agree to a proposed reduction of rates while at the same time the "at first sight identical" right under Article 7 is made subject to very special conditions.

As the right is not identical, no real contradiction ensues. Under Article 7 the Commissioner may go much further than under Article 11; the real truth is that as a practical matter there is a slight overlapping in the effective results of the application of the two articles, when the special conditions of Article 7 really do exist. On the view that Article 11 relates to normal times, the overlapping with Article 7 becomes immediately comprehensible because it is to be expected that the emergency powers of Article 7 should be described and granted in the broadest possible terms which, because of their very breadth, would necessarily include the rights enjoyed during normal circumstances. The Commissioner insists, moreover, that such overlapping as there is relates only to a very small field of Article 7. Moreover the German thesis opens the way to the effective cancellation of the first paragraph, subsections (b) and (c) of Article 7. If the German Government is free under Article 11 to reduce rates of taxation at will unless the prerequisite conditions of Article 7 are in existence, and if the Government does in fact reduce rates, then paragraphs (b) and (c) become dead letters as protective contingencies because, by their terms, they create rights in the Commissioner only when there is a falling off for six months in the revenues, the tariffs of which "have remained *unmodified*." Under the German doctrine and under the express statements of the present German case, the Commissioner may be helpless to take action either under Article 11 or Article 7 except when there is an inadequacy for the *current* budgetary liabilities; the Commissioner, however, has already in his main case stressed the necessity of protecting *future* payments.

5. Finally, the third point of the German case, as based on the Protocol, is that the German Government is required to approach the Commissioner

with a view to obtaining his assent only "whenever in its opinion there is question of a reduction of the rates within the meaning of Article 11. The Commissioner is thus incidentally relieved of the obligation of considering whether a proposed alteration in a revenue represents a reduction of the rates within the meaning of Article 11. The work of the Commissioner is thereby technically facilitated. Practice has shown that the decision as to whether changes in the rates actually involve reduction is not always altogether simple."

The Commissioner on the other hand submits that, if it be true that practice has shown that the decision as to whether a change in the rates involves a reduction is difficult, then it would seem that the Commissioner, charged with the protection of the security of the creditors, and vitally interested in the decision to be reached, would have something to say on the subject. Had Article 11 intended that the Commissioner should exercise his discretion only if and when the special conditions of Article 7 existed, one would think, as a matter of simple clarity, that the article would have said so in express terms.

The Commissioner has found nothing to shake his opinion that, on the true construction, Article 11 contains a continuing limitation on the validity of the action of the German Government; the Commissioner, acting under a full sense of responsibility, will decide on considerations which seem to him to be proper, having regard to the security of the creditor states, whether or not the proposed step is justified and whether or not it should receive his assent. This conclusion of the Commissioner is supported, he believes, by the general principles of the law of pledge, by uniform international practice in analogous cases of the assignment of specific state revenues as security, and by the text, the spirit, and the object of the Protocol and the Experts' Plan.

1. In his rejoinder the Commissioner first states that the exact maximum figure which the controlled revenues have to secure is of secondary importance to his argument, which is that the sums payable from, and secured by, the controlled revenues continually, progressively and enormously increase in future years and that this fact makes it incredible that the clear, simple and peremptory language of Article 11 could be properly so construed as to oblige the Commissioner to give his consent to a reduction in rates which in his best judgment, and according to the best advice he could secure, would, or might well, endanger the security of the increasing payments.

The passage in the Experts' Plan to which the German reply refers as if it in some way put limits on the control created, or implied that the security of the creditors might be reduced against their will (Part II Chapter II (c)) has no connection with the problem of control or the extent of the security demanded, except in so far as it refers back to Part I of the Plan where certain revenues were chosen "*as guarantees.*" The nature of the normal control of the Commissioner under the Plan is totally different from the type of permanent intervention which the Experts were discussing in the paragraph to

which the German reply refers as if it had a direct relation to the powers of the Commissioner.

The argument of the German reply that it is not clear what importance is attributed by the Commissioner to the fact that the controlled revenues serve, exceptionally, to determine the supplemental amounts, lead the Commissioner to refer back to the reasons for which in his first case he described in full the part played by the controlled revenues (*i.e.*, as security for Germany's debt), and further to state that the entire argumentation at this point is incompatible with Section 2 of the terms of submission to arbitration, since it constitutes a question of expediency or opportuneness and not of law.

3. The Commissioner takes flat issue with the allegation that in international law, and particularly in the interpretation of treaties, general principles of law and comparative jurisprudence are not applicable; if there be no international law, and the principles of private jurisprudence are not applicable, by what canon the arbitrator is to be guided it is indeed difficult to determine. He quotes passages from the writers Oppenheim, Wharton and Holtzendorf relating to the application of the principles of contracts and statutes for the interpretation of treaties and paragraph 3 of Article 38 of the Statute of the Permanent Court of International Justice. In connection with the relation between the text of a treaty and the sovereignty of the state, limited by the obligation incumbent upon it under the text, he recalls the terms of the sentence pronounced by the Permanent Court in the affair of the *S.S. Wimbledon*.

If finally the German reply states that reduction in rates often results, as an economic matter, in a net increase of the actual yield of the revenues, it is reasonable that the Commissioner, in the exercise of his trust, should have the right to consider the probable result of the reduction; it must necessarily be presumed that he will act with reason and discretion, but if there is a reasonable certainty that the reduction will impair the security of the creditors, Article 11, in the Commissioner's view, empowers him to withhold consent to this injurious measure.

4. In the Commissioner's view the Protocol, which the German reply declares to be decisive for the present dispute, in the self-contained, lucid, direct and peremptory language of Article 11 can only be construed to mean what that article so clearly and so unqualifiedly says. Whereas the German reply declares that the Commissioner's point that Article 7 describes the active powers of the Commissioner, while Articles 11 and 12 describe the limitations upon the validity of action taken, is merely a play upon words, the Commissioner considers that reference to treatises on mortgage law or upon the law covering the pledge of movable property as security will throw light on the soundness of the position that the time-honored distinctions between limitations on the pledger or mortgagor and grants of active rights to the mortgagee or pledgee merely constitute a play on words.

In reply to the assertion that the facts given in the German reply (that in

the years 1924 to 1926 the yield of the controlled revenues was higher than the budgetary contribution required in a standard year, that the Protocol provides for a reserve fund of 100 million gold marks and that new German laws have raised the rates of certain taxes, the application of which, however, has been postponed) show that there is no reason for lack of confidence in the German Government in regard to the execution of the Experts' Plan, the Commissioner points out that there is no question of mistrust, but merely a question of security, that the Plan is based on confidence plus control and that in addition the remarks made on both sides about the contemporaneous results of the tax yield are quite valueless for the present dispute.

5. The Commissioner believes that enough time has elapsed and enough instances have occurred to justify the conclusion that an international practice has grown up in cases where states have assigned certain revenues to a control body as security for the payment of a debt owed abroad, according to which the assignor state may not take steps reducing the rates or yield of the revenues assigned without the prior consent of the creditors or of their control representative. He also describes the systems of control in Greece, Egypt and Austria and comes to the conclusion that, far from refuting his assertions, the conventions as a whole, both in text and in spirit, rather corroborate his point of view.

The Commissioner considers that the interpretation of the German Government would run counter to the remainder of the Protocol, read as a whole, would run counter to the comparative principles of a law of pledge in the light of which the Protocol is to be regarded, would run counter to a long series of international precedents in analogous cases, and would be incompatible with the letter, the spirit and the object of the business plan of the Experts.

Conclusions

Article 11 of the Protocol concerning the contributions to be made from the German Budget and the institution of control over the revenues from customs and the taxes on spirits, tobacco, beer and sugar reads as follows:

"The rates of the assigned duties on spirits, tobacco, beer and sugar shall not be reduced by the German Government without the consent of the Commissioner."

If this text is considered alone, and if no account is taken of the other articles of the Protocol, of its general system or of that set forth in the Experts' Plan in application of which it was enacted, there seems no doubt that no reduction of any kind made in the above rates by the German Government can be put into execution until the prior consent of the Commissioner has been obtained, while the Commissioner has the arbitrary power to give or refuse his consent.

The first conclusion is clear: the article makes no distinction. In the second place, whenever in legislation an act or decision of any organization

requires the consent of a third party in order to be valid, that third party is in no way bound unless a stipulation to the contrary exists. Such a stipulation usually contains a regulation to the effect that consent may only be refused or granted under the conditions or in the cases indicated. Neither Article 11 nor any other article of the Protocol contains a limitation of the kind.

It remains to be seen whether this interpretation is in harmony with the Protocol as a whole and when compared with the system of the Experts' Committee.

The German Government holds that, if Article 11 gave the Commissioner general powers which he could use at will under any circumstances, its contents should have appeared among the rights mentioned in Article 6. It is indeed true that in this way with certain drafting alterations, all doubt as to the real meaning of the article would have been avoided, but on the other hand, if the Government interpretation is correct, the powers mentioned in Article 11 should be found in Article 7 and be inserted under figures (a) to (b) of that article. For the rest neither the drafting nor the position of Article 11 indicate that it refers only to the cases dealt with in Articles 7 and following. Rather the contrary: whereas Articles 7 to 10 are closely connected, as is clear from the wording of Articles 8 to 10 which in each case refer to the preceding article (*cf.* Article 9 "on the other hand;" Article 10 "if these measures"), this is not true of Article 11; this article is evidently the first of several at the end of the Protocol which are general in character and refer to all circumstances, normal and abnormal.

Further, the German Government sees an absolute contradiction between Articles 7 and 11 as soon as it is held that the bearing of the latter is general. The alleged contradiction is that, if under Article 11 the Commissioner has at all times the right to refuse his consent to a reduction in rates, there is no reason to give him a suspensive veto in the case of Article 7; it is impossible to speak of extended rights "in the case of rights existing already and at least equal in extent."

It is true that this may be looked upon as in some sort an *inelegantia juris;* Article 7, when granting the Commissioner a right of suspensive veto in regard to a series of legislative and administrative measures which also include reductions in rates, might have excluded these reductions (already included in Article 11), or might in any case have made a reservation with regard to that article.

No contradiction however would appear to exist. Article 7 gives the Commissioner a right which he does not possess under normal circumstances, to intervene in the administration and in the preparation of bills; it also gives him a right which, in so far as it refers to a proposed reduction in rates, may be exercised simultaneously with that indicated in Article 11, with which it is not absolutely identical.

Whereas moreover Article 11 contains no provision as to the manner or

time of the Commissioner's consent, provided that the consent is obtained before the reduction comes into force, Article 7 lays down definite rules and even fixes a time limit for the exercise of the right. From this formal point of view it may be said that Article 11 gives the Commissioner more extended rights, but from the material point of view the rights include only a part of those referred to in Article 7; further the need for the Commissioner to ascertain whether in each special case there is or is not a reduction in rates (a need which is all the more imperative as soon as the Government and the Commissioner are not in agreement) is not incumbent upon him, or at least not to the same extent, when the conditions of Article 7 are fulfilled.

Once it is found that the alleged contradiction between Articles 7 and 11 is not calculated to overthrow the arguments supporting the contention that Article 11 is general in character, there is no need, for the case in point, to discuss the relation between Articles 7 and 11, as the German Government does in defence of its thesis, nor subsequently to examine how far the relation may be considered satisfactory. It is sufficient to say that, if the Government is prepared to admit that under all circumstances the consent of the Commissioner has to be acquired for a reduction in rates, the view that in normal cases the obligation to obtain this consent is a mere formality finds no confirmation, as was said above, in the text of Article 11.

In regard to the case in point the Experts' Plan established the following principles:

1. The economic activity of Germany will be unhampered and unaffected by any foreign organization other than the controls provided in the Plan.
2. A settlement of reparation must be reinforced by adequate and productive securities. We propose for this purpose a system of control which we believe will be effective, and at the same time such as not to impede the return to financial stability.

In the report these securities and this control are further defined and it is stated that the revenues from customs and the taxes on spirits, tobacco, beer and sugar will furnish a collateral security for the creditors of Germany and will be placed under their control. These revenues were chosen *inter alia* for the reason that for 1928/1929 their total, excluding customs, was estimated by the officials of the German Government at 1,700 million gold marks (by the experts consulted by the Committee at 2,145 millions) and that in consequence they would leave a considerable margin over and above the budget contributions under the treaty which are fixed for the standard year at 1,250 millions; these revenues will pass directly into the hands of an impartial and effective control.

Whereas if there is a risk that the revenues will become inadequate the Commissioner responsible for the control would have to assume the responsibility of detailed direction and to insist on the exact tariffs or the exact form

of administration which would in his view secure the utmost yield, he has normally only to see that the administration is reasonably efficient and the accounting system honest and accurate.

After elaborating the principles of responsibility for details of administration, where this is necessary, and indicating the rights of which the technical control would, *in the ordinary course*, consist for the Commissioner, the text of the report continues as follows: "The German Government should be asked not to reduce the rate of the assigned revenues without the consent of the Commissioner." This wording and the position of the sentence in the report give reason to think that the Experts wished to give this power to the Commissioner (or to limit the sovereignty of the Government) under all circumstances and that they did not consider that a provision of the kind runs counter to the principle that in the ordinary course the Commissioner should take no responsibility for the application of rates likely to insure the maximum yield, which is in any case quite another matter: the latter intervention may be said to be positive in character, whereas the right to refuse consent to a reduction in rates is negative. Even if, in view of its position the above sentence is not considered as forming part of the control rights *in the ordinary course* of events, it clearly represents a general proposal which is applicable under *all* circumstances.

This sequence of ideas in the Experts' Plan seems to fit logically into the system. If the assigned revenues are to furnish an adequate security for budgetary payments and collateral for others, there is every reason to stipulate that these securities shall not be diminished without the prior consent of the creditors' representative. A system of control established for the integral preservation of a security must logically see to it that the intrinsic value of the security does not decrease. The obligation to obtain the consent of the Commissioner even in normal circumstances cannot be considered as running counter to the desire of the Committee of Experts to reject as inopportune, apart from certain exceptional circumstances, any system which would directly or indirectly mean virtual control of all the receipts and payments of Germany. Such consent in no way implies intervention on the part of the Commissioner in the administration of the controlled revenues or even in financial policy in general: its only object is to see that the "tangible and productive" guarantee in no way loses its value. If it is true, as the Government says, that the economic activity of Germany shall not be hampered by any foreign organization "other than the controls provided in the Plan" it is necessary to decide whether an interpretation of Article 11 in accordance with the Commissioner's view is or not in harmony with the system of control of the Experts. While the Government recalls the fact that the Experts did not insist on the increase of any particular tax or on detailed administrative control and that they rejected a system whereby any alteration in rates, even if entirely justified from a social and political point of view, would be examined with such a degree of care and perhaps even of

mistrust that it might be a fruitful source of friction and dispute, on the other hand it is permissible to conclude from what has been said that they had in mind an effective control of the assigned revenues, which were chosen as security in view of their suitability and because of their estimated amount during the years to come in proportion to the payments to be made. That the rate of the revenues should under no circumstances be reduced without the consent of the Commissioner, a consent which he is free to give or refuse, must be regarded as being in perfect harmony not only with the passage quoted above from the Experts' Plan, but also with the system itself; it cannot be looked upon as illicit intervention in the tax policy of Germany such as it was not intended to establish.

It is unnecessary to say that, once the Commissioner is free under all circumstances to give or refuse his consent, the question as to whether a decrease has to be noted in the yield of the particular tax, the rate of which it is proposed to reduce, is unimportant.

Once the meaning of Article 11, interpreted according to its wording and according to the spirit of the Protocol as a whole, and compared with the Experts' Plan, seems clear, it is unnecessary to consider how far this interpretation may be justified by the general principles of the law of pledge or by international practice.

In so far, moreover, as the systems of international financial control of the last half century are looked upon as constituting international practice, it is true that the conclusion reached by international literature is that in general the control makes any reduction in the rates of the assigned revenues dependent on the consent of the creditors or of their representatives, and that frequently the stipulations in question tend to express this view, which is in any case a natural and logical one, but with varying shades of meaning and differences; the powers of the creditors are therefore decided by the formal clauses inserted in each special convention; in the case in point the contention that the Commissioner's interpretation of the article would be an infringement of the sovereignty of the state is in reality a *petitio principii;* the fact that the article constitutes a limitation on the exercise of the right of sovereignty makes it an obligation to interpret it strictly; but this obligation could never mean that the article is denied the meaning which its wording formally requires; the exact meaning has therefore to be determined by all justifiable means.

Finally, the question of the circumstances, extent and grounds of the Commissioner's right to refuse his consent to a reduction in rates does not arise and may therefore be passed over in silence.

It results from the above statements that the question submitted to arbitration must be answered in the negative.[1]

Consequently

[1] It should be noted that, as the German text of the Terms of Submission is differently worded, the question has to be answered in the affirmative according to the German text.

THE ARBITRATOR

Having regard to Annex I of the Agreement executed at London on August 9, 1924, between the Reparation Commission and the German Government, which Annex contains the Protocol concerning the contributions to be made from the German Budget and the institution of control over the revenues from customs and the taxes on spirits, tobacco, beer and sugar;

Having regard to the Terms of Submission to Arbitration of a divergence of opinion between the Commissioner of Controlled Revenues and the German Government as to the interpretation of Article 11 of Chapter III of the above-mentioned Protocol;

Having regard to the memoranda duly submitted by each of the parties;

Having regard to the considerations set forth above;

DECIDES AS FOLLOWS:

Under the terms of Article 11 of Chapter III of the above-mentioned Control Protocol, as read with the Protocol as a whole, the Commissioner of Controlled Revenues has the power to decline to consent to a reduction in the rate of an assigned revenue proposed by the German Government, even if the special conditions set forth in Article 7 of Chapter III of the Control Protocol are not in existence, *i.e.*, a falling off in the yield of the revenues as such falling off is defined in the first paragraph (a), (b) and (c) of said Article 7, and even if, in addition, no decrease is noted in the returns from the particular revenues as to which a reduction in rate is proposed.

Given at The Hague, *June 23, 1926.*

(Signed) VAN LYNDEN SANDENBURG.

ARBITRAL TRIBUNAL OF INTERPRETATION*

CREATED UNDER THE PROVISIONS OF ANNEX II TO THE LONDON AGREEMENT OF AUGUST 9, 1924, BETWEEN THE REPARATION COMMISSION AND THE GERMAN GOVERNMENT

AWARD NO. II,

Delivered on January 29, 1927

Interpretation of the Dawes Plan.

The annuities prescribed by the Experts' Plan as payable by Germany to the Agent General for Reparation Payments do not comprise compensation paid by the German Reich to German nationals in respect of the retention, liquidation or transfer of their property, rights or interests, such payments being made in execution of the Treaty of Versailles, and in particular under Articles 297, 74, 145 and 156.

Before:

M. THOMAS NELSON PERKINS, *President,*
M. MARC. WALLENBERG,
M. A. G. KRÖLLER,
M. CHARLES RIST,
M. A. MENDELSSOHN BARTHOLDY.

* Text furnished by the Secretary of the Tribunal.

Whereas by Terms of Submission dated at Paris, the 25th March, 1926, the Reparation Commission and the German Government have agreed to submit for decision to the Tribunal the question whether or not the annuities prescribed by the Plan for the discharge of the reparation obligations and other pecuniary liabilities of Germany under the Treaty of Versailles, accepted by the London Conference of August, 1924 (which Plan is hereinafter referred to as the Experts' Plan) as payable to the Agent General for Reparation Payments comprise:

Compensation paid since the 1st September, 1924, or which may be paid in the future by the German Reich to German nationals in respect of the retention, liquidation or transfer of their property, rights or interests, on whatever date such measures may have been taken, such payments being made in execution of the Treaty of Versailles and in particular under the following articles of that treaty, that is to say, Articles 297 (i), 74, 145, 156 (2nd paragraph) read with paragraph 2 of the Protocol signed at Versailles on the 28th June 1919, and 260;

And whereas the agents of the parties to the present arbitration have duly communicated to the Tribunal their cases, countercases, and documentary evidence within the periods fixed by agreement of the parties;

And whereas the oral debates have taken place and have been declared closed in accordance with the rules governing this arbitration by virtue of the aforesaid Terms of Submission;

And whereas the Tribunal has jurisdiction to pronounce upon the question submitted to it for decision, the said question constituting a dispute with regard to the interpretation of the Experts' Plan which by the terms agreed at the London Conference, confirmed in this respect by the correspondence exchanged by the Reparation Commission and the German Government on the 30th May and 4th June, 1925, are to be submitted to it for decision;

Now therefore the Tribunal, having carefully considered the written proceedings and oral debates and the documentary evidence submitted by the parties, after due deliberation pronounces as follows:

The annuities prescribed by the Experts' Plan as payable to the Agent General for Reparation Payments do not comprise: Compensation paid since the 1st September, 1924, or which may be paid in the future by the German Reich to German nationals in respect of the retention, liquidation or transfer of their property, rights or interests, on whatever date such measures may have been taken, such payments being made in execution of the Treaty of Versailles and in particular under the following articles of that treaty, that is to say, Articles 297 (i), 74, 145, 156 (2nd paragraph) read with paragraph 2 of the Protocol signed at Versailles on the 28th June, 1919, and 260.

Reasons

1. Clause 1 of Annex IIA of the London Agreement of August 9th, 1924, between the reparation Commission and the German Government provides

that "subject to the powers of interpretation conferred upon the Reparation Commission by paragraph 12 of Annex II to Part VIII of the Treaty of Versailles and subject to the provisions as to arbitration existing elsewhere, and in particular in the Experts' Plan or in the German legislation enacted in execution of that Plan, all disputes which may arise between the Reparation Commission and Germany with regard to the interpretation either of the agreement concluded between them, the Experts' Plan, or the German legislation enacted in execution of that Plan, shall be submitted for decision" to arbitrators, that is to say: to this Tribunal. As a statement preliminary to the reasons for its present award, the Tribunal desires to recall this clear provision, which received express confirmation in the correspondence exchanged by the Reparation Commission and the German Government on the 30th May and 4th June, 1925. The provision shows that the Tribunal's jurisdiction is limited, limited to the interpretation, *inter alia*, of the Experts' Plan. It follows that the Tribunal has to take the Plan as it finds it, interpreting its meaning as it thinks is correct, without allowing itself to be influenced by considerations as to whether or not it might be rightly contended that its award will have consequences which might be looked upon as not desirable. If the Tribunal took another view, and allowed itself to be influenced by considerations of the nature just referred to, its activities might result in what in effect would tend to be an alteration of the Experts' Plan, and it goes without saying that for this Tribunal any such action would be outside its competence. The Tribunal feels bound to explain its point of view in this respect, were it only because either party has represented to it that a decision in favor of its opponent will have undesirable consequences.

2. In the interest of a correct appreciation of its opinion, the Tribunal wishes to emphasize the exact nature of the question submitted to it at this time. It is to be noted that the question, the only question for determination is: whether compensation paid or to be paid after the 1st September, 1924, by the German Reich to German nationals in respect of the retention, liquidation or transfer of the property, rights or interests of such nationals under the provisions of the Treaty of Versailles enumerated in the Terms of Submission governing this arbitration, irrespective of the date of such retentions, liquidations or transfers, is to be included in the annuities prescribed by the Experts' Plan. It seems to the Tribunal to be essential to remember that it is here solely concerned with this question whether *compensation* paid or to be paid to German nationals after the 1st September, 1924 for the retention, liquidation or transfer of their property, rights or interests is to be comprised in the annuities, and to distinguish between this question and the entirely different question which is not submitted to it by the Terms of Submission, namely whether *credits* given or to be given to Germany after the 1st September, 1924 for the value of property, rights or interests of German nationals, retained, liquidated or transferred, are to be deducted from the annuities.

3. Turning now to the Experts' Plan, the Tribunal observes that, in its beginning, it is pointed out that they were invited by the Reparation Commission to "consider the means of balancing the budget and the measures to be taken to stabilize the currency of Germany." The Experts understood their task to mean that they were not (in the words of Part 1, Section IV, of the Plan) to lose "sight of the fact that the stabilization of the currency and the balancing of the budget are means designed to enable Germany to satisfy her own essential requirements and to meet her treaty commitments, the fulfilment of which is so vital to the reconstruction of Western Europe."

4. This was the starting-point from which the Experts began to build their Plan. As already stated, it is the function of this Tribunal to interpret that Plan, and this is a case of interpreting it. For this interpretation, the primary source of information is the Plan itself, and it has been the object of the Tribunal to determine the leading thoughts underlying the scheme laid down therein. What did the Experts do? They provided that an amount which in their opinion, based on a careful study of the economic condition of Germany, could safely be taken without jeopardizing the equilibrium of the German budget (by no means necessarily a maximum amount, but an amount which could safely be taken), should be paid in gold marks or their equivalent in German currency into the Bank of Issue to the credit of the Agent General for Reparation Payments. The Plan says (Part 1, Section XII): "This payment is the definitive act of the German Government in meeting its financial obligations under the plan." Then, to guard against the unsettling of the German exchange, the Experts provided for a committee known as the Transfer Committee, whose task it would be to regulate the withdrawals of the sums thus paid by the German Government into the Bank of Issue to the credit of the Agent General for Reparation Payments, and they laid down the purposes for which this committee, to the extent that it deemed possible without endangering the stability of German currency, was to effect withdrawals from the Agent General's account with the bank. The Experts provided that any surplus which there might be in the bank over and above the transfers that could be effected without endangering the stability of Germany currency, should be accumulated in the bank and invested in Germany up to a limit of five milliards of gold marks, and, further, that, if and when such accumulations reached five milliards of gold marks, the payments by the German Government into the bank to the credit of the Agent General for Reparation Payments should be reduced, below the standards set out in the Plan, to that amount which, in the opinion of the Transfer Committee, could be transferred without endangering German currency. The purposes for which the committee was empowered and commissioned to effect withdrawals from the Agent General's account with the bank are indicated in Part 1, Section XIII, of the Plan, and more precisely defined in its Annex No. 6; they are, apart from investments in loans in Germany in case of need as above stated: payments for deliveries in kind, payments under

the Reparation Recovery Acts, and the conversion of credit-balances into foreign currencies. This definition does not include, and cannot, in the opinion of the Tribunal, be read as including, compensation to German nationals to be paid under the above enumerated articles of the Treaty of Versailles.

5. This interpretation of the Plan is supported by many passages, to be found almost throughout its text, whilst the passages relied upon by counsel for Germany do not, in the opinion of the Tribunal, when read in their context, militate against the construction given in the preceding paragraph. It seems unnecessary to quote all these supporting passages, or even to refer to them all; the Tribunal is content to make three quotations.

The first passage which the Tribunal desires to quote is to be found in Section XVII of the first part of the Plan, in which the Experts emphasize some of their points. It is as follows: "From the standpoint of the taxpayer in creditor countries the plan means in due course an annual relief to the extent of two and one-half milliards, plus such additional amount as the index of prosperity may provide."

Secondly, the Experts stated in Part 1, Section V, last paragraph, of their report: "Without undue optimism, it may be anticipated that Germany's production will enable her to satisfy her own requirements and raise the amounts contemplated in this plan for reparation obligations." The distinction between Germany's own requirements and amounts destined for the discharge of reparation obligations, which is made in this passage is, in the opinion of the Tribunal, only comprehensible if the said amounts are looked upon as destined to the exclusive economic benefit of the Allied and Associated Powers.

Lastly, the Tribunal desires to quote Part 1, Section XI, first paragraph, of the Plan. This passage reads: "We desire to make it quite clear that the sums denoted above in our examination of the successive years, comprise all amounts for which Germany may be liable to the Allied and Associated Powers for the costs arising out of the war, including reparation, restitution, all costs of all armies of occupation, clearing house operations to the extent of those balances which the Reparation Commission decide must legitimately remain a definitive charge on the German Government, commissions of control and supervision, etc. Wherever in any part of this report or its annexes we refer to treaty payments, reparation, amounts payable to the Allies, etc., we use these terms to include all charges payable by Germany to the Allied and Associated Powers for these war costs." And immediately thereafter, in the next paragraph, the Experts add: "The funds to be deposited in the special account in the bank are to be available for the foregoing purposes, notwithstanding anything in this report which may be interpreted to the contrary," etc. The Tribunal cannot understand, especially when having regard to the leading thoughts which are the basis of the scheme worked out by the Experts and have been set forth above, how this passage can show

anything else than that the annuities were meant by the Experts to go in full to the Allied and Associated Powers.

The above-quoted provisions, together with the many others which occur throughout the Plan, confirm the Tribunal in its opinion that it is impossible to place upon the Experts' Plan a construction according to which the annuities were intended by the Experts to comprise compensation to German nationals in respect of the retention, liquidation or transfer of their property, rights or interests which gave rise to the present arbitration.

Done at The Hague, on January 29, 1927, in English, French and German. In case of dispute as to the interpretation of this award, the English text shall be authoritative.

THOMAS N. PERKINS, *President.*
E. N. VAN KLEFFENS, *Secretary.*

GENERAL CLAIMS COMMISSION—UNITED STATES AND MEXICO*

THE UNITED STATES OF AMERICA ON BEHALF OF WALTER H. FAULKNER, CLAIMANT, *v.* THE UNITED MEXICAN STATES (Docket No. 47)

Opinion and Decision, November 2, 1926

Claim for damages for false arrest, detention and mistreatment.

Whether there was sufficient ground for the arrest remains entirely doubtful; but as there is not convincing evidence to the contrary, Mexico cannot be held liable for an international delinquency in that respect.

Even in case there might have been sufficient ground for the arrest, the record furnishes convincing evidence that the claimant was detained for several days in a house of detention under intolerable circumstances of indignity and inconvenience, which treatment was an apparent international insufficiency for which Mexico is liable.

Damages awarded at the rate of $150 per day for each day of detention, without interest.

1. It is alleged in the memorial and other parts of the record presented by the American Government that Walter H. Faulkner, who was born and has ever remained an American national, lived in 1915 at San Antonio, Texas, U. S. A., his profession being an interpreter's; that in the fall of said year he visited Tampico, Tamaulipas, Mexico, and from there proceeded on a business trip to Veracruz, Veracruz, Mexico where he arrived on September 25, 1915; that at the end of said month he was waiting there for the arrival of a steamer due on or about October 2, to take him back to Tampico; that in the afternoon of September 30, 1915, he was induced to visit a police office, was submitted there to a search of his pockets and clothes without being told the charge or suspicion against him; that he thereupon was confined until October 7 in a house of detention in the centre of the town, where conditions were extremely bad; that he did not discover until on or after October 4 the charge or suspicion against him to be that of having circulated counterfeit

*Established in pursuance of the convention between the United States and Mexico signed September 8, 1923. C. van Vollenhoven, Presiding Commissioner; Fred K. Nielsen, Commissioner; G. Fernández MacGregor, Commissioner; Clement L. Bouvé, American Agent; B. Carbajal y Rosas, Mexican Agent.

Carranza money; that from October 7 till October 11 he was confined in the Allende prison in the same city, where conditions were tolerable; and that on October 11 he was released, the judge declaring that no sufficient evidence for the charge or suspicion against him was available. For the damages sustained in his honor, time lost and well-being he claims $50,000.

2. The claimant complains of seven acts on the part of Mexican authorities: (a) he was arrested without any sufficient ground; (b) he was not told the grounds of the charge or suspicion existing against him; a fact which prevented him from proving his innocence; (c) he was placed in a house of detention where he suffered maltreatment; (d) he was denied for several days communication either with the American consul or with friends; (e) he was not heard or examined until after some one hundred and two hours; (f) he was transferred from one prison to another in a way repugnant to his self-respect; (g) while he was in detention his hotel valise was opened and searched.

3. The Commission holds that on the face of the record the allegations under (f) and (g) cannot in themselves furnish a separate basis for complaints. They are incidental to the treatment of detention and suspicion, and if consistent with Mexican law do not in themselves contain anything contrary to international rules or duties. It is neither sustained nor proven that the authorities in applying these measures to the claimant violated the Mexican law of procedure or any other Mexican statute.

4. The allegation of the claimant that he has been placed and kept from September 30 to October 7, 1915, in a house of intolerably bad conditions (allegation *c*) has been challenged by stating that it is supported only by affidavits of the claimant himself; that it is impossible for the Mexican Government to rebut it because of the destruction of the records in the De la Huerta insurrection of 1923–1924; and that therefore, in accordance with decisions of former international tribunals, the Commission should not accept as sufficient evidence these statements of the claimant alone, made as late as 1925 or 1926. The Commission, however, sees that the claimant's recent affidavits are supported by the fact that on October 4 and 6, 1915 (prior, therefore, to October 7, 1915), he wrote letters of complaint to the American consul at Veracruz, and that nothing has been adduced to militate against the contention that the jail conditions he describes really existed in the down-town house of detention at Veracruz. The Commission holds the record convincingly establishes that the claimant has been in the said house of detention from a date some days prior to the date of his first letter to the American consul (October 4) up to October 7, the date on which he entered the Allende prison.

5. The allegation made by the claimant that he was arrested without any sufficient ground (allegation *a*) is most difficult to decide on the face of the record. The claimant states so, allowing for no other possible reasons of charge or suspicion against him than the fact that he came from Tampico

where counterfeit Carranza money was being made and issued, and that an unnamed person might have declared that he had been seen circulating counterfeit money at El Paso, Texas. The Commission does not need any theory about presumption of lawfulness of governmental acts to hold, that in the matter of justification of an arrest the mere statement of the person who suffered the arrest cannot be deemed sufficient. Furthermore, the explanation given for the circumstance that the Mexican Government cannot submit to this Commission extracts from its police and judicial records in the case is a reasonable one (to wit: because of their destruction in 1923–1924). The record seems to indicate that, apart from one exception (the day of first examination), the Mexican rules of procedure have been followed; it at least does not show the contrary. The same judge, who was so careful as to tell the claimant on Saturday October 9, 1915, that on Tuesday October 12 the legal period for his detention would elapse and who set him free on the preceding day about noon, mentions in his decree "the proceedings had up to this time"; it is difficult to assume this judge to have been careful about periods and forms and careless as to the main point, the existence of any ground for the investigations. The fact that the period of detention elapsed on October 12 cannot be interpreted as meaning that the period of three days, provided by Article 132 of the Federal Code, had been calculated from either October 7 or 8, for then it would have ceased on October 10 or 11; but it might well mean that two procedures took place, one in a local court, and the other in a military court. The claimant himself states that on or about October 5 he was heard twice, even at so late an hour as eleven p. m., which would seem to show activity on the part of the local judicial authorities, and re-examined on or about October 6, and that in the Allende prison he was examined again on October 9. Where, in case the formalities of procedure had been evidently neglected, a presumption of lack of material grounds for the detention might have had probability, it would seem reasonable, once the record gives the impression that in the main the formalities of Mexican procedure have been complied with, to suppose their having been applied to some material basis for charge or suspicion, and not to proceedings without any foundation whatsoever as required both by the Code and by the Constitution. At any rate the record cannot be said to contain convincing evidence as to absence of sufficient grounds for judicial proceedings, as would be necessary for assuming an international delinquency. The fact that nothing appears about personal steps taken in Faulkner's interest by either the American consul or the acting special representative of the State Department at Veracruz, once they had been informed, can only strengthen the impression that there might have been some ground for charge or suspicion on the part of the Mexican authorities.

6. The allegation that the claimant was not allowed for four days to know the charge or suspicion sustained against him (allegation *b*) must, if proven, have great weight with this Commission. It is suggested by the two letters

the claimant wrote from prison to the American consul, that he was given a first hearing and information only between October 4 and October 6; a fact which would have been illegal in the light of Article 98, paragraph 2, of the said Federal Code in connection with Article 20 of the Mexican Constitution of 1857. It is, however, of more importance to know, whether Faulkner at the time of his arrest understood or was told what was the charge or suspicion against him, such being a matter of prime importance for any person deprived of his liberty (allegation *e*). If the legal period for having a regular hearing of the person under detention had been transgressed, as seems to have been the case, such transgression in itself might have found some excuse in the turbulent and unsettled character of those times and in the press of work on the authorities, and cannot be deemed to amount to an international delinquency; whereas there would be scarcely an excuse if, with respect to the fact of informing the claimant about the character of his case, he had been treated with undue and unnecessary harshness. Here again, however, it is doubtful whether this serious lack of duty on the part of the authorities may be inferred from the sole statement in the claimant's letter of October 4, 1915, and whether therefore there exists convincing evidence as to this point as well.

7. The allegation of the claimant (allegation *d*) that he was not allowed for several days to communicate with his consul would, if proven, also have weight with the Commission. The Commission holds that a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity. It is not clear, however, from the record when and how the liberty to communicate was given the claimant; his letter of October 4, 1915, to the consul appearing, from its wording, not to have been the first communication tendered.

8. The allegation of the claimant (paragraph 4, *supra*) that he was placed for several days in a house of detention where conditions were extremely bad (repulsive filth, human excrement, no provision for sanitation, insects, rats) might have been easily negatived by showing that such conditions do not exist at Veracruz or did not exist there in the fall of 1915. Making allowance for some apparent exaggerations in the claimant's presentation of facts, there is for the Commission every reason to hold that the claimant has been in this house of detention for some five days under conditions that were, for an educated man, intolerable. Maltreatment, apart from the conditions of the house, not only is not proven, but the record seems to show the contrary.

9. The Commission, eliminating from the claimant's complaints everything which might be due to misinterpretation or misrepresentation on his part, and for which the declaration of the claimant alone can hardly be considered sufficient evidence, views the fact that, as the record stands, he must be taken to have been detained for several days in a house of detention under intolerable circumstances of indignity and inconvenience, and that possibly

the harshness of this situation has been increased by the silence of the authorities for some days on the motives for his detention. Even if all other complaints were unfounded or unproven or improbable, these complaints remain, corroborated as they are by letters written from the house of detention at a time where misrepresentation might have withheld from the claimant the American consul's assistance, and written to an American consul by a man who himself had been an American consul. These statements of 1915 cannot be rebutted by presenting them either as mere suppositions on his part or as afterthought of some ten years later. It therefore has to be examined whether either this first fact alone or these two facts combined constitute an international delinquency on the part of Mexico.

10. As the Commission expounded in its opinion in the case of L. F. H. Neer, it holds that the test lies in the application of international standards. That Mexico, just as all other civilized nations, is aware of these standards, is apparent from what the claimant states about the Allende prison; the reliability of his complaints about the down-town building is even rendered more probable by the quite different manner in which he expresses himself not only on the Allende prison, but even on the "better and more healthful compartment" he occupied in the down-town building during October 6 and 7 (or 5 and 6). The Commission holds that, even in case there might have been sufficient ground for the arrest, here at any rate was a treatment of apparent international insufficiency for which the record furnishes convincing evidence and for which Mexico is liable. Whether there was sufficient ground for the arrest remains entirely doubtful; but as there certainly is not convincing evidence to the contrary, Mexico cannot be held liable for an international delinquency in that respect.

11. The determination of damages to be allowed in cases of this type is necessarily uncertain. In the Topaze case, the umpire held after due investigation (Ralston, Venezuela Arbitrations of 1903, p. 331) that a sum of $100 per day (or: not exceeding $100 a day) "seems to be the one most usually acceptable" and "is apparently the favored allowance by arbitrators." The Commission is willing to follow these precedents, but realizing how much the value of money has changed feels bound to increase them fifty per centum. Cases of allowing damages for illegal imprisonment are most similar to the present one, and in such cases tribunals often allowed a gross sum without interest. The Commission is prepared to follow this precedent too. Calculating the amount in the manner most favorable to the claimant who alleges to have been kept for seven days in the first house of detention, the Commission holds that, on the face of the record, full satisfaction is given him by allowing $1,050 without interest.

DECISION

12. On the above grounds, the Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the

United States of America on behalf of Walter H. Faulkner $1,050 (one thousand and fifty dollars), without interest.

Done at Washington, D. C., this 2nd day of November, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

[Commissioner Fred K. Nielson concurred in the award, but rendered a separate opinion indicating his views with respect to legal contentions advanced by each agency in the case, and pointing out that "my acquiescence in an award providing indemnity merely for mistreatment in one of the jails in which Faulkner was imprisoned is due to uncertainties in the record which unfortunately have not been explained." Lack of space prevents the publication of the separate opinion.]

THE UNITED STATES OF AMERICA ON BEHALF OF LEONARD E. ADLER, CLAIMANT, *v.* THE UNITED MEXICAN STATES (Docket No. 363)

Opinion and Decision, November 2, 1926

Claim for false arrest, imprisonment and prevention from obtaining needed medical assistance.

In making judicial pronouncements with respect to alleged wrongful acts of authorities directed against private persons, the commission cannot render an award for pecuniary indemnity in the absence of convincing evidence of a pronounced degree of improper governmental administration. In the absence of evidence of this kind, the claim must be dismissed.

1. Claim is made by the United States of America in this case for indemnity in the sum of $15,000.00 in favor of Leonard E. Adler, an American citizen, who, it is alleged, was wrongfully and arbitrarily arrested by Mexican authorities, held under imprisonment, and during the period of detention prevented from obtaining much needed medical assistance. The occurrences of which account must be taken in passing upon the merits of this claim are not all clearly explained either by the evidence filed with the memorial or by that accompanying the answer. The most important allegations in the memorial are grounded almost solely on an affidavit made by Adler (Annex 4), the substance of which is as follows:

2. In 1917 Adler was in the employ of the Marconi Wireless Telegraph Company of America as a radio operator and was assigned for service on the Mexican steamship *Mexico*, owned by a Mexican company, which had a contract with the Marconi Company for the rental of radio apparatus installed on the vessel. When the ship arrived at Progreso, Yucatan, in the early part of December, 1917, it was boarded and taken possession of by Mexican soldiers under the command of a Mexican officer, who informed the captain of the *Mexico* that no one would be permitted to leave the vessel. The officer stated that the vessel had been commandeered by the Mexican

Government. By order of the officer, guards were placed at the ship's gangway.

3. On December 30, 1917, the commander of the Mexican soldiers entered the radio cabin of the vessel and directed the transmission of a message. Adler informed the officer that the message could not be sent except upon the payment of the cost of transmission the amount of which he made known to the officer. The officer thereupon refused to pay the regular rates and ordered Adler and another operator on the vessel, Lloyd Brasher, to their cabin and placed a guard outside of the door. About January 5, 1918, the captain of the vessel received orders to proceed to Veracruz, Veracruz, Mexico, with the vessel, which arrived at that place about January 7, 1918. Some time after arriving at Veracruz, Adler and Brasher were permitted to go ashore. They visited the American Consul with a view to obtaining information with respect to the detention of the ship. About half an hour after leaving the Consul's office they were arrested and brought to a police station near the wharf. They were questioned and searched, and after several hours of waiting in the station personal possessions which had been taken from them were returned, and the men were taken aboard the *Mexico*.

4. On or about January 20, 1918, Adler became afflicted with a high fever. Several abscesses appeared on his body and his right limb became swollen and gave him much pain. With Brasher he again went ashore with the intention of seeing the American Consul. On the way to the consulate the two were arrested and once more brought to the police station where they were questioned and searched. A Mexican soldier told them that they were suspected of being spies. They were kept at the station throughout the day without food and water. A police attaché inquired of Adler what was the matter with him, and Adler spoke of the fever and the abscesses from which he was suffering. The police attaché rendered no assistance. In the evening of January 20, possessions of the two detained men which had been taken from them were returned to them and they were again brought aboard the vessel.

5. In March, 1918, the guard on the vessel was reduced, and the ship was ordered to proceed to Progreso. On arrival at that place Adler consulted Dr. H. E. Gimler, Public Health surgeon in the service of the United States. Dr. Gimler examined Adler and stated that he was suffering from blood poisoning and advised him to return to a hospital in New Orleans, as there were no facilities for treatment in Progreso.

6. On March 25, 1918, the vessel was released by the Mexican Government and sailed for New Orleans where it arrived on March 28, 1918. There Adler was placed in a hospital and remained a patient for the greater part of seven months.

7. The detention of the vessel under guard of Mexican soldiers for the

period stated in Adler's affidavit is corroborated by affidavits made by Brasher. (Annexes 5 and 6 to the memorial.)

8. The record is not clear with respect to the precise character of the detention of the steamship *Mexico*. The Commission of course cannot question the sovereign control of the Mexican Government over a Mexican vessel in Mexican ports. The evidence before us does not warrant a conclusion that the detention of the vessel was the result of unauthorized acts of Mexican military authorities for whose arbitrary conduct, resulting in inconvenience and severe physical injuries to Adler, the Mexican Government under international law is responsible. The question for determination therefore is, whether, following the detention of the ship, Mexican authorities forcibly compelled Adler to remain upon it and prevented him from obtaining medical treatment. With respect to this particular point the only evidence before the Commission is the affidavit of Adler. That evidence is not discredited by the conclusion we feel constrained to reach that Adler's affidavit does not furnish evidence to support a charge of false imprisonment and an aggravated degree of ill treatment.

9. It is stated in the affidavit that, on the arrival of the *Mexico* at Progreso on December 29, 1917, Mexican soldiers boarded the vessel and guarded the gangway, and that the captain of the vessel was told that no one would be permitted to leave it. A temporary measure of this kind could not in itself be the basis of a charge of wrongful imprisonment. The affidavit also contains allegations with respect to the detention of Adler and Brasher by police both at Progreso and at Veracruz and the return of the two men to the ship under escort of the police. It also appears from Adler's affidavit and from the affidavit of Brasher that the vessel proceeded to Veracruz under guard. Whatever action the guards may have taken to detain persons on board, it seems to be certain that the main purpose of the guard was to control the movements of the vessel. In the absence of positive evidence to the effect that, during the course of the detention of the ship, Adler made known to the Mexican authorities a desire to leave the vessel and to seek proper medical treatment where it might be obtained, and that he was refused permission to do so, we do not feel justified in declaring that he was clearly the victim of unwarranted arrest and detention and maltreatment for which under international law damages should be assessed against Mexico. With respect to this uncertainty in the record and with respect to whatever annoyance and inconvenience Adler may have been subjected to by being detained on shore, it may be observed that the Commission has heretofore broadly indicated a standard by which it considers it must be guided in making judicial pronouncements with respect to alleged wrongful acts of authorities directed against private persons. The Commission has expressed the view that it cannot render an award for pecuniary indemnity in any given case in the absence of convincing evidence of a pronounced degree of improper governmental administration.

DECISION

10. In the absence of evidence of this kind in the instant case, the Commission decides that the claim must be dismissed.

Done at Washington, D. C., this 2nd day of November, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSON,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

THE UNITED STATES OF AMERICA ON BEHALF OF HARRY ROBERTS, CLAIMANT, *v.* THE UNITED MEXICAN STATES (Docket No. 185)

Opinion and Decision, November 2, 1926

Claim for arbitrary and illegal arrest, unlawful detention, and cruel and inhuman treatment.

In the light of the evidence presented, the Commission is of opinion that the Mexican authorities had just cause to arrest the claimant and to bring him to trial.

From the judicial records presented by Mexico it clearly appears that there was a failure of compliance with the provisions of the Mexican Constitution in regard to the maximum period of detention pending trial, and that the claimant was unlawfully held a prisoner without trial for at least seven months.

Equality of treatment of aliens and nationals is not the ultimate test in determining the propriety of acts of authorities against which an alien complains of mistreatment. That test is in international law, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. The treatment of claimant was such as to warrant an indemnity on the ground of cruel and inhuman imprisonment during the entire period of his confinement for nineteen months.

1. This claim is presented by the United States of America in behalf of Harry Roberts, an American citizen who, it is alleged in the memorial, was arbitrarily and illegally arrested by Mexican authorities, who held him prisoner for a long time in contravention of Mexican law and subjected him to cruel and inhumane treatment throughout the entire period of confinement.

2. From the memorial filed by the Government of the United States and accompanying documents, the allegations upon which the claim is based are briefly stated as follows: Harry Roberts, together with a number of other persons, was arrested by Mexican Federal troops on May 12, 1922, in the vicinity of Ocampo, Tamaulipas, Mexico, charged with having taken part in an assault on the house of E. F. Watts, near Ebano, San Luis Potosí, Mexico, on the night of May 5, 1922. The claimant was taken prisoner and brought to Tampico, whence he was taken to Ciudad Valles, San Luis Potosí, where he was held under detention, until he was placed at liberty on December 16, 1923, a period of nearly nineteen months. It is alleged that there were undue delays in the prosecution of the trial of the accused which was not instituted within one year from the time of his arrest, as required by the Constitution of Mexico. These delays were brought to the notice of the Government of Mexico, but no corrective measures were taken. During the entire period

of imprisonment, he was subjected to rude and cruel treatment from which he suffered great physical pain and mental anguish.

3. The United States asks that an indemnity be paid by the Government of Mexico in the sum of $10,000.00 for the wrongful treatment of the accused. It is stated in the memorial that Roberts earned prior to the time of his arrest $350.00 a month; that he would have earned $6,650.00 during the nineteen months that he was under arrest; and that he spent $1,000.00 in fees paid to a lawyer resident in the United States to assist in obtaining his release. A total indemnity is asked in the sum of $17,650.00 together with a proper allowance of interest.

4. The evidence presented by the Agency of the United States consists of affidavits made by Roberts and by other persons; correspondence which Roberts and fellow prisoners exchanged with the American Consul at Tampico, and correspondence exchanged by the Consul with Mexican authorities and with the Department of State. The Mexican Government on its part presented records of judicial proceedings, including proceedings instituted against Roberts and others.

5. It does not appear from this evidence that the Mexican authorities had not serious grounds for apprehending Roberts and his companions. The record of the proceedings instituted by the Mexican authorities shows that at about twelve o'clock on the night of May 5, 1922, the Chief of the Detachment in the Ebano Station, San Luis Potosí, received a telephone message from Mr. Eduardo F. Watts to the effect that, at that moment, there had appeared in front of his house, which is situated on the limits of a small village, a band of outlaws consisting of several men, mounted and armed; that the officer immediately left with the men under his orders to render assistance; that, upon arriving at the house he discovered several persons in hiding; that, having seen flashes of light and heard discharges from firearms, he ordered his men to return fire, whereupon the persons lying in ambush fled and succeeded in escaping due to their being mounted; that he picked up a dead man named Monte Michaels, who was suspected of being implicated in the blowing-up of a train belonging to a petroleum company; that the officer also picked up a rifle having a burnt cartridge and an unused one in the breech, a saddled mule, and other things; and that Watts furnished the information that the fugitives were three Americans. It further appears that an examination of Watts' house disclosed the impacts of several shots fired at the premises; that on May 12th, Harry Roberts and two of his companions were apprehended in the neighborhood of Chamal, where they had fled and where forces had been sent to capture them; that upon their being arrested, their preliminary statements were taken, in which they did not deny that they were the persons who were surprised by the detachment from Ebano on the night of May 5th in front of Watts' house, although they asserted that they had not gone there with criminal purposes. It is further shown by the official Mexican records that on May 15th, the prisoners were

placed at the disposition of the agent of the Federal District Attorney, who immediately ordered a preliminary investigation; that from this time until the date when Roberts was placed at liberty judicial proceedings continued, first before the First District Court of Tampico, Tamaulipas, and afterwards before the Judge of First Instance of the District of Valles, San Luis Potosí; and that in the record of the proceedings instituted before those officials there are found statements of the accused and testimony of other persons indicating that there were grounds for suspecting that Harry Roberts and his companions had committed a crime—grounds sufficient to warrant the authorities to proceed with the arrest and trial of the accused.

6. The Commission is not called upon to reach a conclusion whether Roberts committed the crime with which he was charged. The determination of that question rested with the Mexican judiciary, and it is distinct from the question whether the Mexican authorities had just cause to arrest Roberts and to bring him to trial. Aliens of course are obliged to submit to proceedings properly instituted against them in conformity with local laws. In the light of the evidence presented in the case the Commission is of the opinion that the Mexican authorities had ample grounds to suspect that Harry Roberts had committed a crime and to proceed against him as they did. The Commission therefore holds that the claim is not substantiated with respect to the charge of illegal arrest.

7. In order to pass upon the complaint with reference to an excessive period of imprisonment, it is necessary to consider whether the proceedings instituted against Roberts while he was incarcerated exceeded reasonable limits within which an alien charged with crime may be held in custody pending the investigation of the charge against him. Clearly there is no definite standard prescribed by international law by which such limits may be fixed. Doubtless an examination of local laws fixing a maximum length of time within which a person charged with crime may be held without being brought to trial may be useful in determining whether detention has been unreasonable in a given case. The Mexican Constitution of 1917, provides by its Article 20, section 8, that a person accused of crime "must be judged within four months if he is accused of a crime the maximum penalty for which may not exceed two years' imprisonment, and within one year if the maximum penalty is greater." From the judicial records presented by the Mexican Agent it clearly appears that there was a failure of compliance with this constitutional provision, since the proceedings were instituted on May 17, 1922, and that Roberts had not been brought to trial on December 16, 1923, the date when he was released. It was contended by the Mexican Agency that the delay was due to the fact that the accused repeatedly refused to name counsel to defend him, and that as a result of such refusal on his part proceedings were to his advantage suspended in order that he might obtain satisfactory counsel to defend him. We do not consider that this contention is sound. There is evidence in the record that Roberts constantly requested

the American Consul at Tampico to take steps to expedite the trial. Several communications were addressed by American diplomatic and consular officers in Mexico to Mexican authorities with a view to hastening the trial. It was the duty of the Mexican judge under Article 20, section 9, of the Mexican Constitution to appoint counsel to act for Roberts from the time of the institution of the proceedings against him. The Commission is of the opinion that preliminary proceedings could have been completed before the lapse of a year after the arrest of Roberts. Even though it may have been necessary to make use of rogatory letters to obtain the testimony of witnesses in different localities, it would seem that that could have been accomplished at least within six or seven months from the time of the arrest. In any event, it is evident in the light of provisions of Mexican law that Roberts was unlawfully held a prisoner without trial for at least seven months. With respect to this point of unreasonably long detention without trial, the Mexican Agency contended that Roberts was undoubtedly guilty of the crime for which he was arrested; that therefore had he been tried he would have been sentenced to serve a term of imprisonment, of more than nineteen months; and that, since, under Mexican law, the period of nineteen months would have been taken into account in fixing his sentence of imprisonment, it cannot properly be considered that he was illegally detained for an unreasonable period of time. The Commission must reject this contention, since the Commission is not called upon to pass upon the guilt or innocence of Roberts but to determine whether the detention of the accused was of such an unreasonable duration as to warrant an award of indemnity under the principles of international law. Having in mind particularly that Roberts was held for several months without trial in contravention of Mexican law, the Commission holds that an indemnity is due on the ground of unreasonably long detention.

8. With respect to the charge of ill-treatment of Roberts, it appears from evidence submitted by the American Agency that the jail in which he was kept was a room thirty-five feet long and twenty feet wide with stone walls, earthen floor, straw roof, a single window, a single door and no sanitary accommodations, all the prisoners depositing their excrement in a barrel kept in a corner of the room; that thirty or forty men were at times thrown together in this single room; that the prisoners were given no facilities to clean themselves; that the room contained no furniture except that which the prisoners were able to obtain by their own means; that they were afforded no opportunity to take physical exercise; and that the food given them was scarce, unclean and of the coarsest kind. The Mexican Agency did not present evidence disproving that such conditions existed in the jail. It was stated by the Agency that Roberts was accorded the same treatment as that given to all other persons, and with respect to the food Roberts received, it was observed in the answer that he was given "the food that was believed necessary, and within the means of the municipality." All of the details

given by Roberts in testimony which accompanies the memorial with respect to the conditions of the jail are corroborated by a statement of the American Consul at Tampico who visited the jail. Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment.

9. The respondent Government has not denied that, under the convention of September 8, 1923, acts of authorities of San Luis Potosí may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims can be predicated on such acts.

10. As has been stated, the Commission holds that damages may be assessed on two of the grounds asserted in the American memorial, namely, (1) excessively long imprisonment—with which the Mexican Government is clearly chargeable for a period of seven months, and (2) cruel and inhumane treatment suffered by Roberts in jail during nineteen months. After careful consideration of the facts of the case and of similar cases decided by international tribunals, the Commission is of the opinion that a total sum of $8,000.00 is a proper indemnity to be paid in satisfaction of this claim.

DECISION

11. For the reasons stated above the Commission decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of Harry Roberts $8,000.00 (eight thousand dollars) without interest.

Done at Washington, D. C., this 2nd day of November, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

THE UNITED STATES OF AMERICA ON BEHALF OF LAURA MAY BUFFINGTON JANES, INDIVIDUALLY, AND AS GUARDIAN OF BYRON E. JANES. JR., AND ADDISON M. JANES, MINOR CHILDREN, AND ELIZABETH JANES, AND CATHERINE JANES *v.* THE UNITED MEXICAN STATES (Docket No. 168)

Opinion and Decision, November 16, 1926

Claim for damages for the failure of the Mexican authorities to take prompt and efficient action to apprehend the murderer of an American citizen.

Held, upon the evidence, that there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer as to warrant an award of indemnity.

As to the measure of damages, a distinction drawn between the damage caused by the killing itself, for which the slayer was responsible, and the damage for the denial of justice caused by the non-punishment of the slayer. Mexican Government held not responsible for damages caused by the murder, and award made for the personal damage caused the claimants by the non-apprehension and non-punishment of the murderer.

Separate statement regarding damages by Nielsen, Commissioner.

1. Claim is made by the United States of America in this case for losses and damages amounting to $25,000.00, which it is alleged in the memorial were "suffered on account of the murder, on or about July 10, 1918, at a mine near El Tigre, Sonora, Mexico, of Byron Everett Janes," an American citizen. The claim is presented, as stated in the memorial, "on behalf of Laura May Buffington Janes, individually, and as guardian of her two minor children, Byron Everett Janes, Jr., and Addison M. Janes; and Elizabeth Janes and Catherine Janes."

2. Briefly summarized, the allegations in the memorial upon which the claim is based are as follows:

3. Byron Everett Janes, for some time prior to and until the time of his death on July 10, 1918, was Superintendent of Mines for the El Tigre Mining Company at El Tigre. On or about July 10, 1918, he was deliberately shot and killed at this place by Pedro Carbajal, a former employee of the mining company who had been discharged. The killing took place in the view of many persons resident in the vicinity of the company's office. The local police *Comisario* was informed of Janes' death within five minutes of the commission of the crime and arrived soon thereafter at the place where the shooting occurred. He delayed for half an hour in assembling his policemen and insisted that they should be mounted. The El Tigre Mining Company furnished the necessary animals and the posse, after the lapse of more than an hour from the time of the shooting, started in pursuit of Carbajal who had departed on foot. The posse failed to apprehend the fugitive. Carbajal remained at a ranch six miles south of El Tigre for a week following the shooting, and it was rumored at El Tigre that he came to that place on two occasions during his stay at the ranch. Subsequently information was received that Carbajal was at a mescal plant near Carrizal, about seventy-five miles south of El Tigre. This information was communicated to Mexican civil and military authorities, who failed to take any steps to apprehend Carbajal, until the El Tigre Mining Company offered a reward, whereupon a local military commander was induced to send a small detachment to Carri-

zal, which, upon its return, reported that Carbajal had been in this locality but had left before the arrival of the detachment, and that it was therefore impossible to apprehend him.

4. It is alleged in the memorial that the Mexican authorities took no proper steps to apprehend and punish Carbajal; that such efforts as were made were lax and inadequate; that if prompt and immediate action had been taken on one occasion there is reason to believe that the authorities would have been successful; that it was only after a money reward for the capture of Carbajal had been offered that some dilatory steps were taken to apprehend him in a nearby town where he was staying.

5. The memorial contains allegations with respect to the earning capacity of Janes, the loss suffered by his wife and children because of his death, and their want of means of support.

6. To substantiate the allegations of fact in the memorial of the United States and the charge that Mexican authorities failed to take effective steps to apprehend the men who shot Janes, there were filed with the memorial certain affidavits, statements, and copies of reports of the American Consul at Tampico to the Department of State from which it appears that the Consul addressed the Governor of Sonora, pointing out that the killing of other Americans in mining camps in Sonora in the past had gone unpunished and urging that the Mexican authorities take steps to apprehend Carbajal.

7. In the answer filed by the Mexican Government it is denied that the Mexican authorities failed to take appropriate steps to arrest and punish Carbajal. Accompanying the answer is a certified copy of judicial proceedings showing the action taken to investigate the killing of Janes and the orders given with respect to his apprehension. Attention is also called to the use of an armed force to capture the fugitive concerning which information is given in evidence accompanying the memorial of the United States.

8. An affidavit made by the widow of the deceased under date of February 1, 1926 (Annex 11 to the memorial) contains information regarding the circumstances attending the killing of her husband. The details furnished are doubtless substantially correct, but like other matters contained in the affidavit are naturally based on information which she had received from others.

9. An affidavit (Annex 12 to the memorial) was furnished by L. R. Budrow, the General Manager of the Lucky Tiger Combination Gold Mining Company, an American corporation, owners of the stock of the Tigre Mining Company. In this affidavit Mr. Budrow states that on a visit he made to El Tigre shortly after Janes' death, he obtained the impression that very limited efforts had been made by the authorities at the time to capture Carbajal and that there was a general rumor in El Tigre that Carbajal was seen at that place a few nights after the murder. The affiant attached to his affidavit a report made by R. T. Mishler, Manager of the El Tigre Mining Company, on April 11, 1925, with respect to the killing of Janes. The

following extract from that report doubtless states in a substantially accurate way the facts with respect to the killing of Janes and the steps taken shortly thereafter by Mexican authorities to apprehend Carbajal:

> Mr. Janes had been Mine Superintendent of the Tigre Mine for six months preceding the tragedy.
>
> He had had trouble with a trammer named Pedro Carbajal and had given orders for his discharge.
>
> Mr. Janes and his Assistant Mr. W. W. Williams, were accustomed to hire new men at the mine office, near the entrance to No. 4 Level, which is situated about a hundred yards from the American quarters in the town of El Tigre. Carbajal had requested that he be re-instated in his work on two or three evenings before the tragedy and had been refused.
>
> On the evening of July 10 (1918) at about 3.30 P. M. he again requested work and was again refused.
>
> After Mr. Janes and Mr. Williams had left the office and were about half way up the path leading to their quarters, Carbajal started running after them brandishing a revolver. The Americans heard him when he had almost reached them. Mr. Janes dodged by him and started to run back toward the office. Mr. Williams stood still and said "don't shoot." Carbajal snapped his pistol, point blank at Mr. Williams but it failed to go off. He then turned and fired at Mr. Janes as he was running down the path. The bullet entered the back near the spine causing Mr. Janes to fall. Carbajal ran up, placed his pistol at Mr. Janes' head and fired a second shot through the brain.
>
> Carbajal then went down the path, threatening with his pistol, a half dozen Mexicans gathered around the office, and disappeared up the canon.
>
> The *Comisario* was advised within five minutes after the murder and was on the spot five minutes later. He lost a half hour in getting his policemen together and insisted that they should be mounted. The company furnished the animals and the posse left camp about 4.30 P. M. They returned about 7.00 P. M. and reported that they had not seen Carbajal. They were also out the following day, but without results.
>
> It is current talk that Carbajal stayed at a ranch 6 miles south of Tigre, for a week following the murder and that he came into Tigre on two nights during the week, but it is most difficult to prove this story.
>
> Later word was received that Carbajal was at a mescal (native liquor) plant near Carrizal, 75 miles south of Tigre. Both the civil and military authorities were advised of this report. Finally the Major in charge of the district was persuaded to send a small detachment to Carrizal to investigate, with the promise by the company of a substantial reward should Carbajal be captured. On their return the detachment reported that the man had left before they arrived.

10. Doubtless the evidence accompanying the memorial of the United States furnishes accurate information with regard to the killing of Janes, and with regard to the preliminary steps taken looking to the apprehension of Carbajal. The evidence on this first mentioned point is substantially the same as that given by witnesses whose statements are recorded in the record

of judicial proceedings accompanying the answer. With respect to these preliminary steps, we feel justified in reaching the conclusion that they were inefficient and dilatory. From an examination of the evidence on this point accompanying the memorial, and more particularly from an examination of the records produced by the Mexican Government, we are constrained to reach the conclusion that there was clearly such a failure on the part of Mexican authorities to take prompt and efficient action to apprehend the slayer as to warrant an award of indemnity. The grounds for such a conclusion can be shown by a brief statement of what these records reveal as to the action taken by the authorities.

11. It is shown that in the afternoon of July 10, 1918, the killing of Janes was brought to the notice of the local judge, at El Tigre, and he appointed two men as experts to examine the body of the deceased. On the following day the judge took the testimony of two persons employed by the El Tigre Mining Company. These men, who were not eye-witnesses of the murder, identified the corpse but gave no testimony concerning the facts of the killing. On July 12, the judge took the statement of Guillermo A. Williams, an eye-witness of the killing. On July 13, the judge took the statement of another eye-witness. On July 14, the statement of another eye-witness was taken.

12. On July 15, five days after the killing of Janes, when statements had been obtained from five men, the judge, reciting that there had resulted from the proceedings up to that time sufficient merit for the prosecution of the person who killed Janes, issued an order to the *Comisario* to proceed to the capture of Carbajal.

13. On July 16, the judge took the statement of another eye-witness to the murder. The *Comisario*, in reply to the order directing him to proceed to capture Carbajal, stated that, following immediate steps looking to the capture of Carbajal, which were unsuccessful, orders were given by means of warrants to different authorities where it was thought the accused might take refuge. On July 17, all papers in the case were forwarded by the local judge to the Judge of First Instance of the district. The papers were received by the latter on July 22.

14. On July 30, the Judge of First Instance directed the arrest of Carbajal, and on August 5, a communication in the nature of a circular was sent to the Judges of First Instance in the State of Sonora with the apparent purpose of enlisting their coöperation in the apprehension of the fugitive. This communication recited the facts with regard to the killing of Janes and the preliminary investigations which had been conducted and requested that the communication be returned to the judge who transmitted it.

15. The circular was received by the Judge of First Instance at Arizpo on August 13, and by him brought to the notice of the municipal president on August 14. On August 16, the municipal president felt himself to be in a position to report that Carbajal was not found "in this section." The

circular was evidently not received by the next Judge of First Instance on the route of transmission (the judge at Sahuaripa) until October 14, about two months after it had reached the Judge of First Instance to whom it was originally transmitted. On October 15, it was sent to the municipal president. On November 15, the communication was received by the judge at Cananea and transmitted to the municipal president on November 16. On December 3, the communication was forwarded to the Judge of First Instance at Nogales, Sonora. It thus is shown that from August 5, the date when the circular was first dispatched, until December 3, a period of about four months, the circular had reached but three judges.

16. In this manner, as shown by the record, the circular proceeded to judges at Magdalena, Altar, Hermosillo, Ures, Guaymas and Alamos, being received on February 12, 1919, seven months after the killing of Janes, by the Judge of First Instance at this last mentioned place. Thereupon it was returned to the Judge of First Instance at Moctezuma who had initiated its dispatch.

17. Carbajal, the person who killed Janes, was well known in the community where the killing took place. Numerous persons witnessed the deed. The slayer, after killing his victim, left on foot. There is evidence that a Mexican police magistrate was informed of the shooting within five minutes after it took place. The official records with regard to the action taken to apprehend and punish the slayer speak for themselves. Eight years have elapsed since the murder, and it does not appear from the records that Carbajal has been apprehended at this time. Our conclusions to the effect that the Mexican authorities did not take proper steps to apprehend and punish the slayer of Janes is based on the record before us consisting of evidence produced by both governments.

18. The respondent government has not denied that, under the convention of September 8, 1923, acts of authorities of Sonora may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicted on such acts.

Measure of Damages for Failure of Apprehension and Punishment

19. The liability of the Mexican Government being stated there remains to be determined for what they are liable and to what amount. At times international awards have held that, if a state shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the state responsible for the very consequences of the individual's misdemeanor. Opinions to this effect are to be found in the international awards in the Rudon & Company case (Moore 1655; under the convention of December 4, 1868), in the Cotesworth & Powell case (Moore, 2053, 2082, 2085; under the convention of December 14, 1872) and in the Bevallins and Hodlund cases (Ralston, Venezuelan

Arbitrations of 1903, p. 953), separate opinions of seemingly the same tendency being expressed in the cases of De Brissot *et al.* (Moore, 2968, 2969; under the convention of December 5, 1885). The reasons upon which such finding of complicity is usually based in cases in which a government could not possibly have prevented the crime, is that the non-punishment must be deemed to disclose some kind of approval of what has occurred, especially so if the government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty.

20. A reasoning based on presumed complicity may have some sound foundation in cases of non-prevention, where a government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of non-repression. Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the state, so far from having transgressed its own penal code (which perhaps not even is applicable to it) has transgressed a provision of international law as to state duties. The culprit cannot be sentenced in criminal or civil procedure unless his guilt or intention in causing the victim's death is proven; the government can be sentenced once the non-performance of its judicial duty is proven to amount to an international delinquency, the theories on guilt or intention in criminal and civil law not being applicable here. The damage caused by the culprit is the damage caused to Janes' relatives by Janes' death; the damage caused by the government's negligence is the damage resulting from the non-punishment of the murderer. If the murderer had not committed his delinquency, if he had not slain Janes, Janes (but for other occurrences) would still be alive and earning the livelihood for his family; if the government had not committed its delinquency, if it had apprehended and punished Carbajal, Janes' family would have been spared indignant neglect and would have had an opportunity of subjecting the murderer to a civil suit. Even if the non-punishment were conceived as some kind of approval, which in the Commissioner's view is doubtful, still approving of a crime has never been deemed identical with being an accomplice to that crime; and even if non-punishment of a murderer really amounted to complicity in the murder still it is not permissible to treat this derivative and remote liability not as an attenuate form of responsibility, but as just as serious as if the government had perpetrated the killing with its own hands. The results of the old conception are unsatisfactory in two directions. If the murdered man had been poor, or if, in a material sense, his death had meant little to his relatives, the satis-

faction given these relatives should be confined to a small sum, though the grief and the indignity suffered may have been great. On the other hand, if the old theory is sustained and adhered to, it would, in cases like the present one, be to the pecuniary benefit of a widow and her children if a government did *not* measure up to its international duty of providing justice, because in such a case the government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the state had succeeded in apprehending and punishing the culprit.

21. It cannot surprise, therefore, that both international tribunals and governments more than once took a different view, or at least abstained from sustaining the first view. The Commission is not aware of an international award in which the distinction has been set forth with clearness. But the Commission is aware of more than one award and governmental interposition which, in allowing or claiming damages in connection with non-punishment of a wrongdoer, abstained from linking up to the amount of these damages with the loss caused by the act of the individual. In the Glenn case (Moore 3138; under the convention of July 4, 1868), the amount of damages was not connected with any assumption of complicity. In the Lenz case the Government of the United States, on account of non-punishment of the culprits, only claimed "a reasonable indemnity" (March 25, 1899; Moore, Digest VI, 794). In the Renten case, the same Government for the same reason at the same date pleaded "gross negligence, if not complicity," therefore leaving the assumption of complicity doubtful, and claimed a lump sum "for the murder of Renten and the failure promptly to apprehend and adequately punish the offenders," a position indicating that the government did not consider the non-punishment to be identical with the murder (Moore, Digest VI, 794). Mr. Hyde, interpreting the policy in this respect of the Government of the United States, says:

"The amount of the indemnity requested and obtained appears, at times, to have been out of proportion to the pecuniary loss sustained by the victims or their dependents *in consequence of the laches of the territorial sovereign*" (Hyde, I, p. 515). And how dangerous inferences from awards which are silent on resumed complicity are is shown by the fact that, whereas the American Agency quoted the correspondence in the case of the Mexican shepherds as testimony in favor of the older doctrine, a German author quotes it as a striking example of the new one. (Schoen, *Die völkerrechtliche Haftung der Staaten aus underlaubten Handlungen*, 1917, p. 38.)

22. The answer to the question, which of the two views should be accepted as consistent with international law in its present status, would seem to be suggested by the fact that here we have before us a case of denial of justice, which, but for some convincingly logical reason, should be judged in the same manner as any other case of the same category. Denial of justice,

in its broader sense, may cover even acts of the executive and the legislative; in cases of improper governmental action of this type, a nation is never held to be liable for anything else than the damage caused by what the executive or the legislative committed or omitted itself. In cases of denial of justice in its narrower sense, governments again are held responsible exclusively for what they commit or omit themselves. Only in the event of one type of denial of justice, the present one, a state would be liable not for what it committed or omitted itself, but for what an individual did. Such an exception to the general rule is not admissible but for convincing reasons. These reasons, as far as the Commission knows, never were given. One reason doubtless lies in the well-known tendency of governments (Hyde, I, p. 515; Ralston, 1926, p. 267) to claim exaggerated reparations for non-punishment of wrongdoers, a tendency which found its most promising help in a theory advocating that the negligent state had to make good all of the damage caused by the crime itself. But since international delinquencies have been recognized next to individual delinquencies, since damages for denial of justice have been assessed by international tribunals in many other forms, and since exaggerated claims from one government as against another have been repeatedly softened down as a consequence of arbitral methods, it would seem time to throw off the doctrine dating from the end of the eighteenth century, and return to reality.

23. Once this old theory, however, is thrown off, we should take care not to get the opposite extreme. It would seem a fallacy to sustain that, if in case of non-punishment by the government it is not liable for the crime itself then it can only be responsible, in a punitive way, to a sister government, not to a claimant. There again, the solution in other cases of improper governmental action shows the way out. It shows that, apart from reparation or compensation for material losses, claimants always have been given substantial satisfaction for serious dereliction of duty on the part of a government; and this world-wide international practice was before the governments of the United States and Mexico when they framed the convention concluded September 8, 1923. In the Davy Case, a case, not of unpunished crime, but of inhuman treatment of a foreigner under the color of administration of justice, the award rightly stated (Ralston, Venezuelan Arbitrations of 1903, p. 412) that "there is left to the respondent Government only one way to signify . . . its desire to remove the stain which rests upon its department of criminal jurisprudence." In the Maal case, a case of attack on a foreigner's personal dignity by officials, the award rightly stated (Ralston, Venezuelan Arbitrations of 1903, p. 1916): "The only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefore in the way of money compensation." The indignity done the relatives of Janes by non-punishment in the present

case, is as that in other cases of improper governmental action, a damage directly caused to an individual by a government. If this damage is different from the damage caused by the killing, it is quite as different from the wounding of the national honor and national feeling of the state of which the victim was a national.

24. The Commission holds that the wording of Article I of the convention, concluded September 8, 1923, mentioning claims for losses or damages suffered *by persons or* by their properties, is sufficiently broad to cover not only reparation (compensation) for material losses in the narrow sense, but also satisfaction for damages of the stamp of indignity, grief and other similar wrongs. The Davy and Maal cases quoted are just two among numerous international cases in which arbitrators held this view. The Commission does not think lightly of the additional suffering caused by the fact that a government apparently neglects its duty in cases of so outstanding an importance for the near relatives of a victim.

25. As to the measure of such a damage caused by the delinquency of a government, the non-punishment, it may be readily granted that its computation is more difficult and uncertain than that of the damage caused by the killing itself. The two delinquencies being different in their origin, character and effect, the measure of damages for which the government should be liable cannot be computed by merely stating the damages caused by the private delinquency of Carbajal. But a computation of this character is not more difficult than computations in other cases of denial of justice such as illegal encroachment on one's liberty, harsh treatment in jail, insults and menaces of prisoners, or even non-punishment of the perpetrator of a crime which is not an attack on one's property or one's earning capacity, for instance a dangerous assault or an attack on one's reputation and honor. Not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the government's attitude. If the non-prosecution and non-punishment of crime (or of specific crimes) in a certain period and place occurs with regularity, such non-repression may even assume the character of a non-prevention and be treated as such. One among the advantages of severing the government's dereliction of duty from the individual's crime is in that it grants an opportunity to take into account several shades of denial of justice, more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment and pardon), whereas the old system operates automatically and allows for the numerous forms of such a denial one amount only, that of full and total reparation.

26. Giving careful consideration to all elements involved, the Commission holds that an amount of $12,000.00, without interest, is not excessive as satisfaction for the personal damage caused the claimants by the non-apprehension and non-punishment of the murderer of Janes.

DECISION

27. On the above grounds, the Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America $12,000.00 (twelve thousand dollars), without interest, on behalf of Laura May Buffington Janes, widow of Byron Everett Janes, and Elizabeth Janes, Catherine Janes, Byron E. Janes, Jr., and Addison M. Janes, their children.

Done at Washington, D. C., this 16th day of November, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

SEPARATE STATEMENT REGARDING DAMAGES

All members of the Commission are in entire accord with respect to the analysis of the facts of the case from which we have drawn the conclusion, as has been stated, that there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer of Janes as to warrant an award of indemnity. However, I think it is advisable to indicate in a separate statement my views relative to the contentions advanced before the Commission as to the principles that should govern us in determining the amount of a pecuniary award.

The subject of the measure of damages in a claim like the instant case, involving a charge of neglect in the apprehending and punishing an offender, was discussed in briefs filed by the two Agents and in oral arguments.

The position of the Agency of the United States with reference to this question is that in such a case a state is responsible in damages sufficient to compensate the claimant for the injuries flowing from the wrongful act of the individual, and that this responsibility rests upon the offending state because by its failure to act it condones and ratifies the wrongful act, thereby making the act its own. (American Brief, p. 3.)

The position of the Mexican Agency with regard to the question at issue may be indicated by the following extract from its brief (p. 12):

> III. In that case responsibility can only be demanded by a foreign state when negligence is so serious and so frequent as to endanger the safety of foreigners and the guaranties to which they are entitled.
>
> IV. This responsibility cannot be heard by the Commission because it has no jurisdiction.
>
> V. The same act may motivate a responsibility towards the victim of the crime or its next of kin, but only in so far as it can be shown that this negligence and not the crime itself has directly caused the damage which can be ascertained in money.
>
> VI. The measure of damages whenever this responsibility is involved, must be exclusively ascertained with reference to the law of the place where the act took place. The Mexican laws do not recognize moral

damage and therefore, even though it had been shown that the claimants in the instant claim had justified a moral damage, this cannot be a matter which can be ascertained in a pecuniary way.

VII. These moral damages in no wise can be assessed since they are in essence exclusively punitive.

International law imposes on a nation the obligation to take appropriate steps to prevent the infliction of wrongs upon aliens, and to employ prompt and effective measures to apprehend and punish persons who have committed such wrongs. There is no dispute between the two Agencies with regard to these requirements of the law. In the instant case indemnity is asked for on the ground of the neglect of authorities to take proper measures to arrest and bring to justice the person who killed Janes. The contention of the Mexican Agency advanced in this particular case, to the effect that the Commission is without power to redress by a pecuniary award an international delinquency growing out of a failure of a government to live up to solemn obligations of this kind I consider to be a remarkable contention, supported by no authority. It is interesting to note that it appears that this contention has been advanced in no other case among the large number of similar cases filed by both Agencies. And it is a particularly pertinent fact that numerous cases have been brought to the attention of the Commission in which the Mexican Government have alleged liability on the part of the United States in substantial amounts for the failure to apprehend and punish persons who have committed wrongful acts against Mexicans in the United States. For example, in the Diaz claim (Docket No. 293) it is stated on pages 1 and 2 of the memorial:

> The lenity of the American authorities in regard to the institution of due legal process, to the discovery of the guilty party and to his punishment, constitutes a true denial of justice, which is a justification of the right of Cataline Balderas de Diaz, the mother of the man slain, and injured by the loss of her son, to demand compensation, and she was dependent on him for a living and such injury has not been made good to her. She grounds her petition on Article I of the convention concluded between Mexico and the United States on September 8, 1923.
>
> Taking into account the probable life-expectancy of Mauricio Diaz, the claimant estimates the damage suffered by her at $50,000.00 Mexican gold or the equivalent thereof, in dollars.

The subject of damages is always a difficult one in international arbitrations. It seems to be clear that international tribunals cannot apply rules by which to assess damages as definite as the rules by which domestic tribunals are governed in civil cases. A contention that an international tribunal such as that created by the convention of September 8, 1923, has no power to award damages in cases like the present one prompts a consideration of the functions of international tribunals, and of international practice, particularly as it is revealed by the decisions of arbitral tribunals in the disposition of claims similar to the instant case.

International controversies which diplomacy fails to solve may be settled by resort to force or by judicial methods. This Commission is charged with the judicial determination of all claims of the nationals of each government against the other arising since July 4, 1868, excepting certain claims incident to recent revolutions in Mexico. It is the function of the Commission to pass upon these cases in accordance with rules and principles of international law imposing like obligations on the two countries and securing rights that inure to the benefit of their respective nationals. I do not consider that this Commission is impotent to afford redress of a substantial character in cases like the present one in which there has been a failure to carry out a solemn obligation imposed by international law. This view is convincingly supported by the declarations of foreign offices in diplomatic exchanges, the writings of authorities on international law and the rules and principles repeatedly stated and applied by international tribunals. In dealing with the question raised by the Mexican Agency in the pending case, I consider the decisions of arbitral tribunals to be of especial importance. The action taken by such tribunals reveals what I regard as sound reasoning upon which from time to time appropriate disposition of international controversies has been grounded. I deem it to be proper that weight should be attached to rules and principles that have often been formulated and applied in the light of experience, and not to reject them, unless, of course, we are convinced that they are unsound or that they have been given a wrongful application.

Rules and principles of law are not formulated in terms of pure logic. All rules are in a measure arbitrary, and the criterion of the value of any rule is the extent to which its advantages outweigh its disadvantages. Assuredly the theory repeatedly advanced that a nation must be held liable for failure to take appropriate steps to punish persons who inflict wrongs upon aliens, because by such failure the nation condones the wrong and becomes responsible for it, is not illogical or arbitrary. Certainly there is no violence to logic and no distortion of the proper meaning of the word "condone" in saying that a nation condones a wrong committed by individuals when it fails to take action to punish the wrongdoing. It seems to be equally clear that, irrespective of what may be the particular facts of any given case, a nation may logically be charged with responsibility for crime when it is shown that proper punitive measures have been neglected. The degree of fault attributable to a nation will, of course, depend upon the facts of each given case. A community protects itself against crime by police measures to prevent offenses against the law and by appropriate measures to punish wrongdoing. The prevalence of crime has often been ascribed to lax police measures and to a dilatory and ineffective administration of criminal jurisprudence resulting in the failure to apprehend criminals, in inadequate punishment, or in no punishment at all. Correspondence which has been exchanged between the Government of Mexico and the Government of the United States with respect to controversies pending for arbitration, and which is included among

the records of the Commission, shows that each government has from time to time pointed out the danger to the safety of its nationals of a lax administration of justice. It is clear that arbitral tribunals in assessing damages for the failure of authorities to punish wrongdoers have taken account of the damage caused by the wrongful acts of the culprits for which governments have been held responsible. The opinions of some tribunals reveal that they have also taken account of other elements of damages, and I am of the opinion that that may properly be done. There are further considerations pertinent to the question of the responsibility to which a nation may be held for failure to punish crime. International law recognizes the right of a nation to intervene to protect the interests of its nationals in foreign countries, through diplomatic representations, and through instrumentalities such as those afforded by international tribunals. It seems to be clear that the recognition of this right is fundamentally grounded on the often asserted theory that an injury to a national is an injury to the state to which the national belongs. If this theory were not sound it is difficult to perceive why the existence of this right of intervention should be recognized with regard to a limited number of persons within the territorial jurisdiction of a sovereign nation which is broadly described by Mr. Chief Justice Marshall in the opinion written by him in the case of The Exchange (7 Cranch 116, 136) in which he said:

> The jurisdiction of the Nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

A nation has a right to insist upon the observance of obligations of international law which in a certain sense, undoubtedly qualify so far as aliens are concerned, these plenary sovereign rights which, as described by Chief Justice Marshall, a nation may exercise with regard to the persons and property of its own nationals. An alien has a right to rely upon an observance of rights which are secured to nations by international law and which inure to his benefit. Persons dependent upon him have that right, and international tribunals have the power to award redress for the disregard of such rights. These elementary principles are referred to in the extracts from Dr. Anzilotti's discussion of the responsibility of the state under international law quoted in the Mexican Agency's brief. These extracts do not appear to support the contention of non-responsibility advanced in the brief. Dr. Anzilotti distinguishes between the obligations of a state to private individuals under domestic law and the responsibility of a state to another state under international law. He points out that individuals cannot commit acts in contravention of international law. He argues that therefore the commission of such acts cannot in itself be a violation of that law. But,

of course, he does not deny, but expressly emphasizes, the duty of the state to vindicate rights that are secured by international law and that inure to the benefit of private individuals.

When questions are raised with respect to the failure to observe obligations of international law relative to punishment of wrongdoers, and when redress is sought for the delinquency growing out of such failure, the use of the term "punitive" with respect to the nature of the redress that may be afforded seems to be somewhat inapt. If the view is taken that a wrong to a national is a wrong to the state, it may perhaps be said that measures of redress for such wrongs are always in a sense punitive. But international tribunals in making pecuniary awards in cases like the present one do not appear to have considered that they were distinctly concerned in such cases as distinguished from other cases with the infliction of a penalty of what has sometimes been called "smart money." They have obviously considered that they were affording proper compensatory redress in satisfaction of wrongs.

Without any detailed discussion of the particular facts of numerous international precedents, international practice with regard to the rules and principles which have governed international tribunals in assessing damages in cases like the present one may be briefly indicated.

A single passage from the writings of a distinguished French author may be cited as illustrative of the views expressed by numerous well-known writers on international law with respect to the obligations of the law involved in a case of this character and the responsibility of a nation for their observance. Pradiér-Fodéré, in discussing this subject says:

> [1] En somme, les actes privés des nationaux n'engagent pas en principe la responsabilité de l'Etat auquel ces nationaux appartiennent, mais l'Etat dont le gouvernement approuve et ratifie les actes de ses ressortissants, ou qui refuse de réparer le dommage causé par un de ses sujets, de châtier lui-même le coupable, de le livrer pour être puni, devient en quelque sorte l'auteur de l'injure commise, se rend comme complice de l'offense, et autorise pleinement la partie offensée à faire remonter la responsabilité des actes offensants ou dommageables à celui qui se les est volontairement et sciemment comme appropriés. (*Traité de Droit International Public*, 1885; Vol. I, p. 336).
>
> Mais, d'un autre côté, la nation ou le souverain ne doit point souffrir, que les citoyens fassent injure aux sujets d'un autre Etat, moins encore qu'ils offensent cet Etat lui-même . . . parce que les nations doivent se respecter mutuellement, s'abstenir de toute offense, de toute lésion, de toute injure, en un mot de tout ce qui peut faire tort aux autres. Si un souverain, qui pourrait retenir ses sujets dans les règles de la justice et de la paix, souffre qu'ils maltraitent une nation étrangère dans son corps ou dans ses membres, il ne fait pas moins de tort à toute la nation que s'il la maltraitait lui-même . . . Cependant, comme il est impos-

[1] *Translation.* In short, the private acts of citizens do not in principle bind the responsibility of the State to which these citizens belong, but the State whose government

> sible à l'Etat le mieux réglé, au souverain le plus vigilant et le plus absolu, de modérer à sa volonté toutes les actions de ses sujets, de les contenir en toute occasion dans la plus exacte obéisance, il serait injuste d'imputer à la nation ou au souverain toutes les fautes des citoyens . . . Mais si la nation ou son conducteur approuve et ratifie le fait du citoyen, elle en fait sa propre affaire; l'offensé doit alors regarder la nation comme le véritable auteur de l'injure, dont peut-être le citoyen n'a été que l'instrument. Si l'Etat offensé tient en sa main le coupable, il peut sans difficulté en faire justice et le punir. Si le coupable est échappé et retourné dans sa patrie, on doit demander justice à son souverain. Et puisque celui-ci ne doit point souffrir que ses sujets molestent les sujets d'autrui, ou leur fassent injure, beaucoup moins qu'ils offensent audacieusement les Puissances étrangères, il doit obliger le coupable a réparer le dommage ou l'injure, si cela se peut, ou le punir exemplairement ou enfin, selon les circonstances, le livrer à l'Etat offensé, pour en faire justice. . . . Le Souverain qui refuse de faire réparer le dommage causé par son sujet ou de punir le coupable, ou enfin de le livrer, se rend en quelque façon complice de l'injure et en devient responsable. (*Ibid.*, pp. 615–616).

See to the same effect Vattel, Law of Nations (1758), Book II, pp. 161-162; Twiss, The Law of Nations, 2d edit. (1875), Part 2, Par. II, p. 20; Martens, *Traité de Droit International* (1883), Vol. I, p. 563.

The position heretofore taken by the two governments, parties to the

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approves and ratifies the acts of its nationals, or that refuses to repair the damage caused by one of its subjects, or itself to punish the guilty person or to deliver him up for punishment, becomes in a certain measure the author of the injury committed, renders itself an accomplice to the crime and fully justifies the offended party in placing the responsibility for the offensive or injurious acts upon the party which has, as it were, voluntarily and consciously assumed responsibility therefor.

But on the other hand the nation or sovereign must not allow their citizens to do injury to the subjects of another state, much less to offend that state itself . . . because nations must respect one another, refrain from doing anything that may offend, hurt or injure, in a word anything that may wrong others. If a sovereign who should be able to hold his subjects on the paths of justice and peace should allow them to illtreat a foreign nation as a body, or in the person of its members, the injury he does to that nation is no less than if the ill-treatment was at his own hands. . . . Yet, since the state, even though the best regulated, the sovereign, even though the most vigilant and absolute, cannot restrain at will all the acts of a subject, or to hold him on every occasion to the most exact obedience, it would be unfair to charge the nation or the sovereign with all the misdoings of the citizens. . . . But if the nation or its head approves and ratifies the act of the citizen, it makes it its own act; the offended party must then regard the nation as the true principal of the injury of which the citizen perhaps was but the tool. If the offended state has in hand the offender there is no difficulty about his doing justice and punishing him. If the offender has escaped and returned to his mother country, the sovereign must be asked to do justice, and since that sovereign must not allow his subjects to molest or wrong the subjects of another sovereign and, much less, boldly offend the foreign powers, he must compel the offender to make amends for the damage or insult, if it can be done, or subject him to exemplary punishment, or according to circumstances, deliver him up to the offended state for the proper administration of justice. . . . The sovereign who should refuse to cause the damage done by his subject to be repaired or to punish the offender or surrender him, is in a manner making himself an accessory to the injury and becomes responsible therefor.

arbitration under the convention of September 8, 1923, with respect to the issue now raised may be shown, apart from what is revealed through memorials that have been filed with this Commission by each, by a brief reference to diplomatic correspondence of a kind that might be quoted at length with respect to varying situations. The correspondence reveals that both have in the past entertained views in harmony with those expressed by the authors above cited.

Thus, Secretary of State Fish, in an instruction of August 15, 1873, to the American Minister to Mexico, said:

> The rule of the law of nations is that the government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor. (Moore, International Law Digest, Vol. VI, p. 655).

From the correspondence between Secretary of State Fish and Mr. Mariscal, Mexican Minister to the United States, concerning the murder of seven Mexican shepherds in Texas in 1873, it seems to be clear that the Mexican Government predicated its demand for substantial damages on the ground of a denial of justice growing out of the failure of American authorities to apprehend and punish the wrongdoers. In a note addressed to Mr. Fish under date of January 30, 1875, Mr. Mariscal said:

> In my opinion, it is also proved that there has been such denial of justice, not only because during the two years that have elapsed the criminals have not been punished, nor have any decided measures been taken for their detection, but because the prevalence of lawlessness and the inertness or powerlessness of the authorities near the scene of the crime are plainly shown by a multitude of facts and have been recognized by the executive of the state.
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> * * * * *
>
> As to the indemnity for the families of the shepherds, which is likewise solicited by Lozano, he being duly authorized to do so, I think it should be fixed at twenty thousand dollars for each one; and for this there would be no lack of precedents, to which I think it now unnecessary to refer. (Foreign Relations of the United States (1875); Part II, p. 957.)

In the Poggioli Case before the Italian-Venezuelan Commission of 1903, the Commission considered a number of complaints on the part of the claimant against the Venezuelan Government, one of them relating to the failure of Venezuelan authorities to apprehend and punish four persons who had made an attempt upon the life of the claimant in 1891. In discussing this matter, Umpire Ralston said in part:

> Reviewing the authorities, it seems to the umpire that this case differs from those cited from Moore's Arbitrations, in that it is sustained by the clearest proof following distinct allegations, and that there has been in fact a denial of justice by the administrative authorities of the

> state; that the considerations herein narrated come within the language of Calvo, who finds responsibility "in case of complicity or of manifest denial of justice," for there certainly was complicity on the part of the officials and denial of justice as set out; that the criterion suggested by Bonfils was exactly met by the administrative refusal to grant relief when the local government failed to take ordinary and necessary precautions and allowed the offenses complained of to go unpunished after becoming known; that the State of Los Andes, during the years in question, in the language of Creasy, was "habitually and grossly careless and disorderly in the management of its own affairs"; that by its failure to make reparation or punish the guilty, Venezuela has, through the fault of Los Andes, rendered itself "in some measure an accomplice in the injury" and has become "responsible for it," and that according to Hall, the acts complained of being "undisguisedly open and of common notoriety" and being of importance, the state "is obviously responsible for not using proper means to repress them," and has not inflicted "punishment to the extent of its legal powers." (Ralston, Report, p. 869.)

In the case of Cotesworth and Powell under the convention concluded between Great Britain and Colombia on December 14, 1872, there is an extended discussion in the elaborate opinion written by the Commissioners of illegal official acts resulting in damages to the claimants. But it is clear from the opinion that the responsibility of Colombia and the award of damages in this case for property losses resulting from illegal acts, in the amount of $50,000.00, were predicated, not upon the abuses of judicial authorities, but upon an amnesty by which the offending officials were relieved of liability for their wrongful acts. This is shown by the following excerpts from the opinion:

> One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury. And this approval, it is apprehended, need not be in express terms; but may fairly be inferred from a refusal to provide means of reparation when such means are possible; or from its pardon of the offender, when such pardon necessarily deprives the injured party of all redress. . . .
>
> He (the Commissioner) places this responsibility of Colombia solely upon the consequences of the amnesty, thus adhering, as he conceives, to the well-established principle in international polity, that, by pardoning a criminal, a nation assumes the responsibility for his past acts. (Moore, International Arbitrations, Vol. II, pp. 2082, 2085.)

Volume III of Moore's International Arbitrations contains the following account of the Glenn case under the convention of July 4, 1868, between the United States and Mexico, decided by Sir Edward Thornton, the umpire.

> Margaret Glenn made a claim for herself and her minor children for the murder of her husband and son, and the robbery of their bodies. This incident took place on November 1, 1858, about 2 o'clock, P. M., within two leagues of the city of Saltillo, on the road to Monterey.

> The murder and robbery were committed by a squad of soldiers under a sergeant and corporal. It was alleged that these persons were under the orders of a person who was a lawyer in Saltillo and a deputy in the National Congress, but the participation of this person the umpire did not consider sufficiently proved. But the umpire found that there was a denial of justice in the failure to bring to trial those who committed the act of violence, by which means their guilt or innocence might have been established. On the ground of this lack of action on the part of the judicial authorities, the umpire made an award in favor of the claimants for $20,000.00 in Mexican gold (p. 3138).

The Piedras Negras claims under the same convention furnish an interesting illustration of a case in which an arbitral commission, in assessing damages because of the failure of the United States to punish a band of persons who invaded Mexico from Texas, predicated its award on the damages caused by the wrongful acts of the culprits. The commission pointed out that authorities of the United States had made no effort to arrest the offenders, which it was stated could easily have been done, and explained that the commission arrived at its award of $50,000.00 as stated by Dr. Moore, "by making what seemed to be just and equitable allowances to such claimants as appeared to have suffered by the burning and pillaging of the town."

In the Davy Case before the British-Venezuela Commission of 1903, in which it seems clear that liability on the part of Venezuela was predicated on the failure to prosecute persons who had injured the claimant, the umpire, in making an award mentioned several elements of damage of which he considered that account might properly be taken. He said in part:

> It was also the opinion of the honorable Commissioner for Venezuela that the crime was fully atoned when the guilty parties had been prosecuted and punished—a fact which he confidently believed had occurred and of which he felt sure he could give satisfactory evidence before the tribunal. It appeared that preliminary steps had been taken looking to that end, and the evidence adduced at each preliminary inquiry is a part of the testimony used in this case. These preliminary steps had given the President of Venezuela knowledge of the wrong committed, the necessity of punishment commensurate to the offense, and the names of the offenders. The Umpire has no question that the honorable Commissioner for Venezuela has been diligent in his efforts to obtain record evidence that there had been both prosecution and punishment of the guilty ones, but it has been without avail, and there is left to the respondent Government only one way to signify its regard for individual freedom, its abhorrence of such proceedings as are detailed in this case, and its desire to remove the stain which rests upon its department of criminal jurisprudence through the untoward and wicked practices of those who engaged in this conspiracy against the person and liberty of the claimant and the honor of their country. Too great regard cannot be paid to the inviolability of the one and the sacred qualities of the other. The measure of damages placed upon such a crime must not be small. It must be of a degree adequate to the injury inflicted upon the claimant and the reproach thus unkindly brought

> upon the respondent Government. These invaded rights were in truth priceless, and no pecuniary compensation can atone for the indignities practiced upon the claimant; but a rightful award received in ready acquiescence is all that can be done to compensate the injuries, atone for the wrong, and remove the national stain. (Ralston, Report, p. 412.)

(See also with respect to this subject of elements of damage the opinion of Ralston, Umpire, in the Di Caro Case, Ralston, Report, pp. 769–770.)

The international precedents to which reference has been made above are typical of the very considerable number cited in the American brief. By decisions of international tribunals substantial damages have repeatedly been awarded because of the neglect of authorities to employ prompt and efficient measures to apprehend and punish offenders. No case was cited in the Mexican Government's brief in which an award of a different kind had been made. As has been observed above, demands for indemnities in substantial sums have been made in cases of this kind filed by both parties to this pending arbitration. I do not consider that the Commission is powerless to award damages of a substantial nature in cases of this character which often involve odious features of discrimination prompted by prejudice against aliens.

It is asserted in the Mexican Government's brief that the measure of damages in such cases must be exclusively ascertained with reference to the law of the place where the acts underlying a claim in a given case were committed; that Mexican laws do not recognize "moral" damage and that even though it had been shown that the claimants in the instant case had justified a "moral" damage, this is a matter which cannot be settled in a pecuniary way. International law is a law for the conduct of nations grounded on the general assent of the nations of the world. The law is therefore, of course, the same for all members of the family of nations. Obviously it can only be modified by the same processes by which it is formulated, namely, by general assent of the nations. It does not seem possible to conceive of a situation in which a single nation could by a municipal enactment denying a right of redress, relieve itself from making compensation for failure to observe a rule of international law.

In the light of the reasons stated above, I concur in the award requiring that the United Mexican States pay to the United States of America the sum of $12,000.00 (twelve thousand dollars) without interest.

Done at Washington, D. C., this 16th day of November, 1926.

FRED K. NIELSEN,
Commissioner.

BOOK REVIEWS AND NOTES[1]

Historical Aspects of the Immigration Problem. By Edith Abbott. Chicago: The University of Chicago Press, 1926. pp. xx, 881. $4.50.

This large volume is published, according to Miss Abbott, to supplement her earlier book, Immigration: Select Documents and Case Records. Like its predecessor, it is a set of readings compiled from official reports, public addresses, newspaper editorials, magazines and books. Miss Abbott limits the range of her book to the period of the "old immigration" ending about 1882. The materials are classified under five headings: "Causes of Emigration"; "Economic Aspects of the Immigration Problem"; "Early Problems of Assimilation"; "Pauperism and Crime and Other Domestic Immigration Problems"; "Public Opinion and the Immigrant." The readings are arranged chronologically and each section is prefaced by a brief "Introductory Note."

The reviewer's criticism is first with respect to the system of classification. The topics are so broad and inclusive that many of the documents would fit equally well under any of the headings. Miss Abbott does not attempt to guide her reader by classifying the materials in each section under a logical arrangement of subtopics. The introductory notes furnish but little assistance in interpreting the author's plan. The causes of emigration are considered as being fundamentally "economic." Movement takes place according to the degree of variability between economic conditions in Europe and America. While attention is drawn to the fact that artificial stimulation played a rôle in determining the volume of movement, still no attempt is made to trace the evolution of communications during the period in question nor to point out the significant developments in industrial and commercial organization.

Section II is devoted to the rather fruitless task of trying to show how the trans-Atlantic migration during the nineteenth century affected the economic life of Europe and America and the individuals concerned. Over two hundred pages are consumed by documents which present opinions, sometimes of experts, sometimes of politicians or private individuals, on the good and bad effects of immigration. Of course such opinions prove nothing, but they throw light on the attitudes of at least some of the people of the time. Many of these attitudes are still being expressed in practically the same language with regard to present-day problems of immigration.

The section on "Assimilation" is the least satisfactory from the reviewer's standpoint. The documents merely present some of the points of irritation, and the problem is discussed in the conventional way as to what is good or

[1] The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes. — ED.

bad in the behavior of immigrants. No attempt is made to show the process of assimilation or how certain points of grievance arise. Many of the best documents on assimilation are presented in the section on "Public Opinion."

On the other hand, in fairness to the author, it should be stated that the book has many points of value for the student of immigration. The section on "Pauperism and Crime" is particularly good. The materials are well classified and the introductory note is a clear presentation of the problem. It is impossible to publish a book of readings that would completely satisfy many teachers of the subject. But despite what one might say about Miss Abbott's selection and organization of materials, nevertheless she has put into accessible form much that is of real value to both the teacher and the general reader.

R. D. McKenzie.

International Relations. By Raymond Leslie Buell. New York: Henry Holt, 1925. pp. xv, 768. Index. $4.00.

For one person in a single volume to attempt to cover the whole field of international relations might well be regarded as an impossible *tour de force.* Yet Dr. Buell has not only succeeded in making a complete survey, but he has done it with a high degree of clarity and accuracy. The book may well be called encyclopedic in the diversity of topics treated, and yet the reader feels that each subject has been given sufficiently in detail to obtain an excellent bird's-eye view of it not only by itself but also in its relation to kindred subjects.

The author, however, is not entirely happy in his titles for the three general divisions of the book nor in his assignment of subjects to these divisions. Part I is entitled "Problems of Nationalism and Internationalism"; Part II, "Problems of Imperialism"; and Part III, "The Settlement of International Disputes." Yet we find the topic, limitation of armament, perhaps the outstanding problem of internationalism today, placed under Part III. Such subjects as the monopoly of raw materials and tariff discrimination are found in Part I, while foreign investments and concessions appear in Part II. Finally, international conferences and the League of Nations appear in Part III, while international administration in the fields of labor and social activities is found in Part I. However, this is not a serious handicap in using the book as a text, and for the general reader the subjects seem to follow in a fairly natural sequence.

As to over-emphasis or under-emphasis in the topics treated there would naturally be considerable difference of opinion. One might be inclined to criticize the amount of space given to multi-national states and to confederations and federations, on the one hand, and on the other, the failure to give any consideration to the machinery of international intercourse as exemplified

in the diplomatic and consular services. The question of reparations receives twenty-four pages, while the inter-allied debts are granted a scant four.

Perhaps a more serious defect is the lack of balance and selection in the readings to accompany the various chapters. For example, Chapter XXI, entitled "War, Alliances and Armaments," has a selection of thirty-three books and half again as many citations of pamphlets and articles, while Chapter XXVIII, on the "League of Nations," cites two books, one in German published in 1921 in Berlin (although in this instance neither date nor place of publication is given), and one in French published in 1920, which is not even listed in the catalogue of the League of Nations library. In the four pamphlets cited under the same we find no mention of the excellent handbooks and yearbooks published by the World Peace Foundation. A similar criticism might be made in connection with the chapter on "World Courts."

Small inaccuracies are bound to creep into a treatment of such broad compass, as, for instance, we note on page 130 "the principle of freedom of navigation was laid down in the European peace conferences of 1814 and 1815 in regard to the Rhine, Danube, and Scheldt;" again on the following page the Mississippi is put in the same class of internationalized rivers as the Congo and Amazon. But such slight errors are the exception rather than the rule. Considering the stupendous difficulty of the task presented, Dr. Buell has done a remarkably satisfactory piece of work and deserves the greatest credit for producing a text so useful and timely.

GRAHAM H. STUART.

A Treatise on the Law of Prize. By C. J. Colombos, with an introductory chapter by A. Pearce Higgins. London: Sweet & Maxwell, 1926. pp. xxx, 384. Index. 15 shillings net.

It was the original intention of Dr. Colombos to write only of the law of prize as applied in British Prize Courts; but, using the British decisions as a base, he has amplified his study so as to include the law of prize as applied by the prize courts of Austria-Hungary, Belgium, China, France, Germany, Italy, Japan, Portugal, Roumania, Russia, Siam, and the United States—with particular emphasis on the decisions arising from the World War. This book is a sound treatise of the law of prize as it existed in 1914 and as it was changed by belligerent necessity during the war.

The author indicates the frequent divergences which existed in 1914 between the Anglo-American and Continental schools of practice, and is of the opinion that the decisions of prize courts during the war tended to unify rather than increase these divergences. For example, he shows (p. 343) how in 1914 the Anglo-American test for the determination of enemy or neutral character was founded on domicile, while the Continental test was based on nationality. But, during the war he says:

> Continental Powers have given a predominant importance to the question of prohibiting all intercourse of their citizens with persons domiciled in enemy territory, irrespective of what their nationality might be. On the other hand, the restrictions imposed on enemy citizens when domiciled in the belligerent captor's territory, and their inclusion in the Black Lists when resident in neutral countries, has considerably modified the Anglo-American criterion of domicile.

The first chapters deal in an interesting fashion with the organization and jurisdiction of the prize courts of the various countries named above and with the question of what law they administer or claim to administer. There follow comprehensive chapters on "Enemy Character," and "Restrictions on the Right of Capture of Enemy Property." There are also chapters devoted to "Contraband," "Unneutral Service," "Trading with the Enemy," "Blockade," and "Rights and Duties of Captors."

In a chapter on "Procedure," Dr. Colombos supports the important modifications introduced principally by the British Prize Courts during the war as to the abolition of a preliminary hearing, admission of extrinsic evidence, and particularly the shifting of the onus of proof from captor to claimant, which latter he attempts to show was not really a great change (p. 319).

The book concludes with a well-reasoned plea for an international prize court, the objections against which, he says, are not now so great as before the war.

The treatise is based on an examination of the decisions of the various prize courts and the various official regulations which bind them, no mention being made in text or bibliography of any other treatise on the law of prize. The author accepts most of the British "adaptations" of international law to meet new conditions but, on the whole, is impartial. His work is not the mine of information that Verzijl has given us, but it is a more readable volume and is a welcome addition to the literature of the subject.

HERBERT W. BRIGGS.

Pan-Europe. By Richard N. Coudenhove-Kalergi. New York: Alfred A. Knopf, 1926. pp. xix, 218. $2.50 net.

This book by Count Coudenhove-Kalergi of Vienna brings the attention of the reader back to an old theme; but with renewed interest. The author's thesis is that the states of continental Europe should be consolidated into an *ad hoc* politico-economic federation as an agency for self-help.

The author is very much in earnest. If this organization is not set up, he believes, Europe is destined to follow the Romano-German Empire. While, because of a policy of coöperation, other parts of the world are daily growing wealthier, stronger, and more civilized, he finds that "Europe is growing poorer, weaker, and more barbarous." If the present tendency continues, "there will emerge a Russian Napoleon who out of the petty states of east-

ern Europe will form a Rhenish League and thereby inflict the death-blow upon Europe."

Thus old memories are revived. In his address as President of the International Peace Congress in Paris, August 22, 1849, Victor Hugo remarked: "A day will come when those two immense groups, the United States of America and the United States of Europe, shall be seen placed in the presence of each other, extending the hand of fellowship across the ocean, exchanging their produce, their commerce, their industry, their arts, their genius, clearing the earth, peopling the deserts, improving creation under the eye of the Creator, and uniting, for the good of all, these two irresistible and infinite powers, the fraternity of men and the power of God."

Alfred H. Fried, who died during the war, frequently turned in his writings to our Pan-American Union as the outstanding object-lesson for the states of Europe. He held no plea for a political federation, but urged an economic association of European states in a coöperative union.

But to the teachings typified by Hugo, Fried, and many others, this virile young man brings a fresh and clarifying amount of data. He has studied his subject.

He is not unmindful of the work of the League of Nations; but he accepts as a fact that "the attempt of President Wilson to establish an ecumenic League of Nations has failed." He sees various Leagues of Peoples coming into being, such as the British Commonwealth of Nations, the Union of Soviet Socialist Republics, the Republic of China, Pan-America. He is disturbed by the fact that while in the world outside Europe the synthetic is stronger than the analytic tendency, petty states endeavoring to lean upon world empires, Europe is regressing further and further toward atomization. The centralizing forces that seem to be working in America, in Britain, in Russia, in Eastern Asia, make up the challenge to decentralizing Europe. With somewhat of a lack of evidence, characteristic of some of his statements, he concludes in one place that "Washington will become the World Areopagus; Geneva will become Pan-Europe."

The author is a scholar with a wide and increasing following throughout Europe. His work cannot be treated with indifference. While it is a call addressed especially to the youth of Europe, it is a thought stimulant to every student of world affairs. No traveler harassed by the boundary barriers, by the variety of moneys, and by the other demands of divergent interests throughout the twenty-six states of continental Europe, can escape a sigh of relief and a glow of gratulation that there is such a man as this Viennese professor working at the job of ameliorating these tantalizing, curable ills. Furthermore, he may be right when he warns us that upon such a plan hangs the future peace of the world.

ARTHUR DEERIN CALL.

Histoire Diplomatique de la Grèce de 1821 à nos jours. By Édouard Driault and Michel Lhéritier. Paris: Les Presses Universitaires de France, 1926. Vol. V. pp. xvi, 568. Index. Fr. 30.

The fifth and last volume of this study, which is the exclusive work of M. Driault, is an excellent contribution to the diplomatic history of Greece in particular, and to that of Europe, in general from 1908 to 1923. The first four chapters deal with the events of the Turkish revolution of 1908, which led to the annexation of Bosnia and Herzegovina by Austria-Hungary, the Italo-Turkish war of 1911, by which Italy took forcible possession of Tripoli, and occupied the twelve Greek Islands, and the two Balkan wars of 1912–1913, by which Turkey was deprived of most of her European possessions and Bulgaria part of her territorial gains. The remaining five chapters treat of the great upheaval brought about by the World War also in the Near East.

The author tells us how the Entente Powers missed the opportunity of winning Greece to their side when, on August 18, 1914, Mr. Venizelos with the assent of King Constantine offered to send 250,000 soldiers to the aid of Serbia, which proposal was not then accepted in the vain hope of winning Turkey and Bulgaria at the expense of Greece and Serbia. M. Driault also explains how England and France in their eagerness to win the war played a dangerous diplomatic game. Thus while, on one hand, they were trying to induce Greece to coöperate with them, on the other hand they were concluding secret treaties, one with Russia by which they promised to her Constantinople and a part of Thrace, thereby placing under the Russian yoke nearly 500,000 Greeks (treaty of March 5, 1915); the other with Italy, pledging to her the cession of the twelve Greek Islands (treaty of August 23, 1915).

The author, commenting on the incidents resulting from the strife between Constantine and Venizelos, which brought about the separation of Greece into two opposing camps, attributes the main fault for it to the diplomacy of the Allied Powers and to their obstinacy in not guaranteeing the territorial integrity of Greece. After reviewing the negotiations for the conclusion of the Treaty of Sèvres of August 10, 1920, which extended the boundaries of Hellas to the gates of ancient Byzantium, the writer narrates the dubious negotations which culminated in the Treaty of Lausanne of July 24, 1924. As is known by this instrument, Greece was deprived of nearly all the acquisitions assigned to her by the previous treaty. M. Driault, in his criticism of the Allied Powers, does not spare even France, his own country, not only for abandoning the Greek people to their fate, but also for her actions during the war between the Greeks and Turks. He is particularly bitter against Italy, which although she effected her union by virtue of the much heralded principle of nationalities, nevertheless used all her diplomatic skill to reverse this principle whenever it suited her interests.

The author concludes his work with a historical sketch of Hellenism from

ancient times to the present day, thus showing the grasp he has on the subject, which he treats in such an admirable manner, with humor, irony and at times with bitter sarcasm.

THEODORE P. ION.

The Ruhr-Lorraine Industrial Problem. By Guy Greer. The Institute of Economics Series. New York: The Macmillan Company, 1925. pp. xx, 328. Index. $2.50.

This is one of a series of publications on international economic reconstruction issued by the Institute of Economics at Washington. In the present volume, a former member of the technical staff of the Reparation Commission discusses and analyzes the Ruhr-Lorraine industrial problem created by the Versailles Treaty, upon the solution of which the normal functioning of the European iron and steel industry depends. The hope expressed by the author that he may contribute something to a clearer understanding of this problem has been well realized. He has succeeded in producing a book which is at once thorough and clear in its discussion of the subject and which is very interestingly written.

Part I of the book deals with the economic background of the present Ruhr-Lorraine industrial problem. The author sets forth in it the coal and iron industrial system in western Europe as it existed before the war. In Part II the new situation caused by the disruption of the Ruhr-Lorraine region by the Versailles Treaty is analyzed, together with its repercussions on the industrial organization of that region and on the general European economic condition. Part III is devoted to the future possibilities of the Ruhr-Lorraine system and to the examination of three alternatives for the solution of the industrial problem in that region: first, relative independence on the part of France and Germany in the development of their respective metallurgical industries, which has, in fact, been the tendency of those two countries since the war; second, a resort to political pressure by either or both countries with the object of securing economic advantages; and third, a full Franco-German coöperation. In the author's opinion, the first alternative, when adopted, would be likely to bring about economic instability; the second alternative would only render the present industrial problem in the Ruhr-Lorraine region more difficult. The only solution of the problem lies in the third method, namely the fullest possible coöperation between France and Germany.

Since the writing of the present book, considerable progress has been made toward bringing about economic coöperation between France and Germany. The conclusion of the continental steel agreement, the potash agreement, the commercial accord relative to the Saar—these are signs of the present tendency toward an economic *rapprochement* between France and Germany.

WADSWORTH GARFIELD.

Lehrbuch des Schweizerischen Strafrechts. Allgemeiner Teil. By Dr. Ernst Hafter. Berlin: Julius Springer, 1926. pp. xix, 447. Index. 22.50 Mk.

The author of this book is Professor of Criminal Law at the University of Zürich, and he also was closely connected with the elaboration of the project of a unified criminal law in Switzerland. His work is the first part of a text-book on Swiss Criminal Law, discussing its fundamental principles: the sources of criminal law, the field of its application, the elements of crime and the punishment of the criminal.

The criminal law of Switzerland is not yet unified. For over thirty years such a unification has been worked upon and the project of a Federal Criminal Code is actually before the Swiss legislature. Hafter's book is a description of the twenty-five different criminal laws of the Swiss Cantons still in force with constant references to the provisions of the proposed code. In the opinion of Dr. Hafter, it will be several years before the Federal Criminal Code can be adopted.

This text-book, which has been very well received in Switzerland, is of value for every common-law lawyer interested in the main principles of criminal law and their latest development on the European continent.

In paragraphs 11–13, the author discusses the international aspect of criminal law. We learn that in Switzerland, as in many other European states, numerous acts are punished independently of whether committed on Swiss territory or abroad. One Cantonal provision, for example, states: "Subject to the provisions of this criminal code are . . . (also) . . . crimes committed by the inhabitants of the Canton outside of its own territory" (Criminal Code of Schaffhausen, par. 3 b). Hafter remarks, however, that the modern doctrine is hostile to such principles treating the criminal law as a *statutus personalis.* But nevertheless, the project for the Federal Code includes an article stating: "Any Swiss having committed a crime abroad whose nature according to Swiss law would allow extradition, will be punished according to Swiss criminal law whenever the acts constitute a crime in the state where they have been committed, and if the accused has been arrested in Switzerland or has for those reasons been extradited to the Swiss Confederation" (Article 6). If the criminal has been prosecuted abroad, the project provides logically that he should not be punished twice. It is significant that the judge applies Swiss criminal law without regard to the place where the crime has been committed.

On the whole this federal code of Switzerland, although not so radical as the Italian project, reveals a very modern conception of criminal law. The chapters on the treatment of the juvenile criminal and on "protective measures" (*Sichernde Massnahmen*) are most interesting, especially now when the New York Baumes' Law is causing a wide-spread discussion. The regulations for protecting the community from the habitual criminal

are more complicated in the Swiss project, but its proposals seem to us to solve the problem in a more satisfactory manner.

Hafter's presentation of the subject is in accordance with the highly developed analytical method prevailing in the science of law on the European continent. Principles governing the law are discussed in a clear and concise manner, while little attention is paid to cases. There are numerous references to the literature and sources of criminal law, but very few to the decisions of the courts, which have never played the same rôle on the continent as in Anglo-American jurisprudence.

This book is a fine example of the different approach to the law by jurists in Civil Law countries. It also gives a valuable résumé of the theories prevailing in European criminal codes, and ought not to be neglected by students of comparative criminal law.

MAX HABICHT.

Légitimité de la Guerre Aérienne. Opinions recueillies par André Henry-Coüannier. Paris: Per Orbem, 1925. pp. XV, 252. Fr. 50.

We have before us a symposium of the opinions of philosophers, statesmen, lawyers and savants, about 250 in all, residing in the various countries of Europe and in the United States, upon the legitimacy of aërial warfare. The editor or compiler is Professor of Aërial Law at the *Institut des Hautes Études Internationales* in Paris. He has taken a leading part in the activities of the *Comité Juridique International de l'Aviation* and is the editor of the *Revue Juridique Internationale de la Locomotion Aérienne.*

Presented ten years before the late war instead of ten years after it, the question would not have seemed quite so academic. At the present time, every great military Power is developing the aërial branch of the service, supplementary to and coördinated with its armies and navies. One is therefore inclined at first to be somewhat skeptical of the practical value of the editor's work in assembling these opinions. On the other hand, public opinion is in itself a fact to be established by proper evidence, and viewed in this light, the editor has perhaps engaged upon a worth while enterprise. He explains that his purpose has been essentially pacific and humanitarian. In the preface he says that man begins to stand aghast at the effects of his own daring in navigating the air. He is beginning to be pushed on by forces which in time he may not be able to control. The editor therefore seeks to obtain authoritative opinion as to the limitations, if any, which can or ought to be placed upon the use of aircraft in war.

There is, indeed, a certain ambiguity in the question whether aërial warfare is "legitimate," and this has manifested its effects in the various responses. Some have considered the question to be purely legal and have sought to analyze the status of aërial warfare under the Hague rules and the general customs of war on land and sea. Others, probably the larger

number, have sought to draw inferences, partly practical, partly philosophic, concerning the relation of aërial warfare to war as a phenomenon in human life.

The opinions are printed in the order in which they were received, without any effort of system or method. If they may be synthesized at all, they lead to the conclusion that, while agreements to limit aërial warfare may be desirable, such agreements prove futile in time of crisis. Aërial warfare holds perhaps a key position in respect to the future development of the laws of war. The potential destructiveness to life and property by the extension of war to this field has become so tremendous that the legitimacy of its unlimited use has brought into question the possibility of adequately controling *any* of the means of warfare. It is true, a writer here and there in the present collection favors the establishment of a tribunal with jurisdiction to pass upon and to punish war crimes, including crimes committed from the air. But most of the responses lead to the conclusion that the conditions of war have now so completely changed that many of the old restrictions have become obsolete. Under modern conditions, practically the entire population becomes mobilized, either to make use of, or to supply munitions of war. The conception of combatants has thus greatly changed. The result might be summed up in the conclusion so tersely expressed by Senator Jouvenel, "that war may be suppressed but can never be humanized."

ARTHUR K. KUHN.

L'exterritorialité. By Baron Alphonse de Heyking. Paris: Librairie Arthur Rousseau, 1926. pp. vii, 219.

Baron Heyking provides a new edition of his excellent work, first published in 1889, in order to take account of the effects upon the idea of exterritoriality produced by constitutional development in a number of countries, the World War, the advent of Soviet Russia, the evolution of Turkey and Egypt, and the judicial and administrative progress observable in Oriental states. He deals with the subject under the three heads of theory, positive law, and practice, alluding to the difficulty of treating it in a time when a number of countries now under the régime of exterritoriality either are emerging from it or striving to do so.

The author starts from the concept of exterritoriality as an exceptional situation resulting from the political necessity of recognizing the freedom of foreign sovereigns, public missions and bodies of troops from the legally complete jurisdiction of the receiving state. Its history is traced from beginnings in the establishment of permanent diplomatic missions in the seventeenth century. The substitution, in the sixteenth century, of the régime of territorial for that of personal sovereignty, made it necessary to provide a special code of privileges and immunities for the persons and property of envoys. The gradual addition of privilege to privi-

lege led finally to the general acceptance of principles and the recognition of their status as rules of international law. A definition of the situation thus produced was found in the fiction of exterritoriality.

Grotius and Bynkershoek are shown to have originated and developed the theory of exterritoriality; other writers have followed them, while, in some cases, making contributions of value. Of the later publicists one group has accepted the notion of exterritoriality as a legal fiction, embodying the immunities enjoyed by a person who has *de facto* but not *de jure* residence in a foreign state; another group almost equally large, rejects the fiction and regards exterritoriality as a metaphorical expression designed to give emphasis to the privileges it denominates. A third group, writers of the nineteenth and twentieth centuries, opposes exterritoriality. Among them are those who consider it anachronistic, others who wish only to restrict it within rather narrow limits. Heyking points out that acceptance of the fiction is not at all necessary to acceptance of the doctrine of exterritoriality, and that the fiction fails to explain the entire legal position in which exterritorialized persons or things find themselves. His own definition runs: "Exterritoriality is not a fiction but a legal principle which, under certain conditions and to a certain extent, withdraws exterritorial persons from the territorial authority and subjects them to a public exterritorial power. Exterritoriality is, on the negative side, exemption from territorial authority; on the positive side, subjection to exterritorial authority" (p. 35).

The principle of exterritoriality is followed by the author first in those aspects normally recognized by all civilized states, and then in the peculiarities and anomalies observable in the law and practice of different states. The latter is accomplished in connection with a thorough analysis of exterritorial persons: public ministers, the League of Nations and the Permanent Court of International Justice, other functionaries such as the Danube Commission, sovereigns, the Pope and the Holy See, consuls in Oriental states, and communities of exterritorial persons. In the second category the agreement between the Swiss Government and the Secretary-General of the League is outlined; also the arrangements made between states which have established permanent missions at Geneva and the Governments of Switzerland and Geneva. About two dozen such missions exist today.

Considerable attention is devoted to communities of exterritorial persons in China, Morocco and other states. In this connection the author takes no notice of the distinction made by some writers between "exterritoriality" and "extraterritoriality." Respecting the *status quo* in China the author concludes, after a concise and discriminating study of the treaties and the practice under them: "The question reduces itself to a purely practical consideration. When order shall be finally reëstablished in China it will be possible to proceed gradually to the abolition of exterritoriality. . . . But Europe may not be too exacting toward China after having recognized

de jure the Government of Soviet Russia, which certainly is not superior to that of China. . . . The principal difficulty to be surmounted in the solution of this problem lies in the fact that for China it is a question of 'face', while for the foreign Powers moral principles and economic interests are at stake" (pp. 153–4). Already have the facts outrun the author. The issue today is no longer the abolition of extraterritoriality by gradual stages, but immediate abolition—with war or without.

In brief appendices consideration is given to three additional subjects of exterritorial privileges: consuls in Western states, international expositions and aerostats. A useful bibliography suggests material on the general topic of the treatise and gives special attention to the Orient. The table of contents is sufficiently complete to make an index dispensable. Admirably organized and clearly presented, this manageable volume is at once scholarly and readable. Students of the subject will thank Baron Heyking for bringing his monograph up to date and thus further increasing their debt to him for his authoritative works in this and related fields.

HAROLD S. QUIGLEY.

The Acquisition and Government of Backward Territory in International Law. By M. F. Lindley. New York: Longmans, Green and Co., 1926. pp. xxii, 391. Index. $7.50.

No subject could better illustrate the deplorably neglected condition of international law during the nineteenth and early twentieth centuries than the one which is the subject of this volume. Quite unconsciously, it would seem, the author emphasizes this chaotic legal situation by his attempt to give us a "proper understanding of the law of to-day" by including as an essential part of his study the growth of the law since the end of the Middle Ages. Forms of law there were, indeed, during the seventeenth and eighteenth centuries, but little attention was paid to them, or at any rate war conveniently intervened with its title by conquest to dispose of earlier, more regular, titles by discovery and occupation. The last quarter of the nineteenth century saw the struggle for the control of "backward territories" begin in real earnest; the problem was obviously one fraught with great danger to the peace of Europe, to say nothing of other parts of the world; yet statesmen could see no other solution than a system of individual grabbing by devious methods to which the name of law can only be applied ironically.

Dr. Lindley analyzes his subject under four heads. Part I deals with "The Territory," under which title he includes for convenience certain sea areas, such as inland lakes and partly enclosed bays, the marginal sea, and the soil beneath the bed of the open sea. "Backward Territory" is, of course, a relative term, and the author is careful to define it as lying between the extreme of entirely uninhabited land and the upper limit of "territory which has reached the level of what is sometimes known as Euro-

pean or Western civilization." Chapters III and IV discuss "inhabited lands," first from the point of view of legal theory and then from the point of view of state practice, and they include a survey, all too brief for the interest it arouses, of the recognition by the dominant states of the "sovereignty" of the North American Indians and of the African chieftains.

Part II deals with the "Acquiring Sovereign" and has interesting chapters on certain phases of individual and corporate acquisition of territory. Part III deals with the "Methods of Acquisition and Related Matters." Here the author gives us a study of the historical and technical aspects of discovery, occupation, conquest, cession and prescription, followed by an examination of the several forms of control, protectorates, spheres of influence and of interest, leases, and League of Nations mandates. The last two of these chapters contain much valuable material and lead the reviewer to regret that the volume was not limited to those topics.

Part IV, dealing with the "Exercise of the Sovereignty," contains an interesting treatment of the legal relations between the sovereign and third states and between the sovereign and the natives themselves. The latter heading introduces the recent general conventions for the suppression of the slave trade, the liquor trade, and the arms and ammunition trade. The bibliography bearing upon these last two parts is singularly lacking in references to American publications.

On the whole the author has gathered together in his study much useful material and has thrown light upon phases of his subject upon which there was need of discussion. It is perhaps to be regretted that he permitted his study to become so comprehensive, at the expense of neglecting certain aspects of more present importance. "Backward Territory" need not have included the long chapter on "Seas," or even the brief chapter on the "Monroe Doctrine." Indeed, the whole question of acquisition by discovery and occupation might have been omitted, together with the opinions of seventeenth and eighteenth century writers, in favor of a fuller treatment of spheres of influence, spheres of interest, the various forms of protectorates, and mandates, around which the current interests of the nations converge. If it be gratuitous advice to suggest the limits of an author's study, the defense is merely that the problems of immediate interest and present controversy seem so much more important than the more familiar historical background and the theoretical principles of the older writers. In any case the author deserves our thanks for his scholarly study of a problem which not only awaits but urgently calls for constructive treatment by the formulation of new rules of international law.

C. G. FENWICK.

Diplomatic Correspondence of the United States concerning the Independence of the Latin American Nations. By William R. Manning. New York: Oxford Univ. Press, 1925. pp. xxxii, 666; xxix, 667–1428; xxviii, 1429–2189. Index. $15.00.

Although the liberal policy of the Department of State has made its historical archives available to the student of American diplomatic history, these documents have not been so generally employed for the purposes of research as corresponding collections preserved in the Foreign Offices of Europe. Much of the aridity sometimes complained of in American theses and other graduate "special studies" may often be traced to the physical inaccessibility of original material. To remedy the lack of such inspiration on the shelves of the American university library, and to place before diplomats and students the primary source materials necessary to a proper understanding of American foreign policy, the Carnegie Endowment for International Peace has begun the publication of a well-edited series of documents from the official files. The first three volumes of this monumental undertaking have appeared under the supervision of Professor Wm. R. Manning, formerly of the University of Texas, now attached to the Division of Latin American Affairs. It may be noted in passing, that the employment by the Secretary of State in advisory positions of such scholarly assistants is in itself significant of the aims and purposes of the recently reorganized foreign department.

To survey the entire field covered by the formidable table of contents is beyond the scope of this review. To the general reader, and notably the student of international law, the most interesting papers listed are probably those concerning the problem of South American independence which, as the title of the work implies, is the principal subject treated. This critical period, largely dealing with problems of recognition, covers the administrations of Madison, Monroe and J. Q. Adams. The important background of Miranda's unofficial negotiations with Hamilton has, of course, been omitted by Dr. Manning, but the correspondence now published contains much unfamiliar matter essential to a proper understanding of the attitude adopted by the United States toward South American freedom.

Ardent Pan-Americans will perhaps be disappointed by the conservative tone of these instructions. Contrasted with the complacent retrospections of some later authorities, the actual policy adopted was more markedly conservative than is generally believed. Our earlier official gestures towards the South American Liberals were markedly cordial—but cautious to a fault. While acutely conscious of aroused public sympathies, and the enthusiasm for liberty that seethed under the dome of the capitol our envoys and agents were urged, as this correspondence reveals, to wise discretion. Such recurring phrases as "view with a favorable eye," "sympathetic understanding," when applied to republican aspirations in the Southern continent are generally modified by admonitions against "interference." Routine de-

partmental correspondence is not the place to seek for generous expressions of policy. But it is interesting to note to what extent the possible repercussion of the fast-growing success of the patriot armies upon the European situation, and our own ambitions regarding Florida and the Mississippi, rather than an abstract enthusiasm for liberty, govern the tone of these documents. Typical of the policy pursued at this period are the instructions addressed by Secretary Monroe to the United States Agent at Caracas:

> If the people are resolved to maintain their independence their success seems to be inevitable. The United States takes a sincere interest in it from generous sentiments, and from a conviction, also, that in many ways it will prove reciprocally advantageous. France favors it, and Great Britain will not long oppose it, if she does at all by force. Nothing however would be more absurd than for the United States to acknowledge their independence in form, until it was evident the people themselves were resolved to support it.

"Friendly communication" rather than the responsibilities of diplomatic intercourse was the policy followed, yet in due time we became the first nation to acknowledge a South American state.

In many respects, the most significant documents offered by Dr. Manning's collection are those contained in the volume dealing with the immediate background of the Monroe Doctrine. The period of the Holy Alliance—and the efforts of the Tsar-Idealist Alexander to extend his favorite principles of "concerted action" among the great European Powers to include the problems of the South American revolutionists—is one of the most decisive moments in the history of American foreign policy. The following pertinent paragraph is quoted from a Russian Memorial "On the Pacification of the Colonies" (*i.e.*, their return to the domination of Spain and Portugal):

> We consider the Act which will result from the present negotiations as a new corner stone adding strength to the unshaken solidity of the European System . . . by establishing between the benefits contemplated to be produced in the other Hemisphere, a direct relation with the benefits produced in Europe by the *Grand Alliance*. . . . On the other hand the transaction now under consideration presents the first case of a pure and simple application of the principles characterizing the force of the Union of Cabinets. . . . It's real and intrinsic force rests solely on the purity of intentions and in the reciprocity of good faith which animate and actuate the Allied Powers. They cannot however dissemble the fact that nations which have been engaged in the storm of Revolution are but little prepared for this policy.

It was this policy of the European "Union" which, passing beyond the stage of doctrinaire idealism, soon resulted in the oppressive Troppau Protocol. Dr. Manning has furnished a number of new documents throwing light on the skillful and far-seeing diplomacy which, based on Jeffersonian principle, held that we "should avoid implicating ourselves with the Powers of Europe even in support of principles we mean to pursue."

W. P. Cresson.

Imperialism and World Politics. By Parker Thomas Moon. New York: Macmillan Co., 1926. pp. xvi, 583. Index.

The eagerness with which the appearance of Professor Moon's book was awaited in many quarters provides ample confirmation for its author's feeling that just such a general survey of modern imperialism was badly needed. The cordial reception accorded the book by teachers and readers, and even students in the classroom, since its appearance reflects a general agreement that the author has performed in admirable manner the task to which he addressed himself.

That task was not to write a mere narrative history of recent imperialistic diplomacy in terms of periods of years with respect to which the activities of all imperialistic nations should be surveyed. Nor was it to study in their completeness the imperialistic activities of individual nations, one by one. These more formal and obvious methods of treatment were deliberately, and, as it seems, wisely, abandoned for a method of treatment which combines both the topical and the regional approach, the latter predominating.

Thus we have chapters on Central, Western, Eastern, Northern, and Southern Africa, the Near East, the Middle East, Southern Asia, the Far East, the Pacific, and Latin America, in each of which the activities of many nations through many years, and the interplay of various factors and many forces, are traced out. These twelve chapters are preceded by five chapters on the causes of or factors in modern imperialism, and are followed by three chapters on the present situation, in Europe, under League supervision, and as it affects the future.

As the author points out, the difficulties involved in such a treatment, both in the quantitative and in the qualitative sense, are tremendous. The ground to be covered is enormous in extent and the diverse elements to be combined in a unified treatment are manifold, more particularly when an attempt is made to explore and expose the personal and social and economic forces at work in the activities of modern nations. That Professor Moon has completely succeeded in this task he himself would not contend; the present reviewer feels, however, that the result represents a power of organization of thought and material and a skill in treatment for the services of which all students of international relations must be most grateful.

The work at hand is frankly written for the elementary student and general reader, rather than for the advanced scholar. Two results follow. The style is, first of all, kept very simple and informal. In the second place, the author attempts exhaustive precision and sharp documentation only where such treatment seems particularly appropriate to him, leaving, probably, many queries in the mind of the critical scholarly reader unanswered. Neither of these features of the work seem open to serious objection, unless one is to object to a semi-popular work on this subject entirely, which the present reviewer is certainly not disposed to do.

One may, perhaps, feel mildly skeptical of the value of quite so many

dashes ("The Negro Republic of Liberia—and Mr. Firestone"), and quite so much alliteration ("Clothes, Culture, and Caoŭtchoŭc in Congo"), not to mention puns ("Oil and Turmoil in Mexico"). But if these devices will intrigue the men and the women and the children of this broad land to "take an interest in" world affairs, few of us would protest very vigorously. That pertness is nowhere carried over into the essential work of drawing conclusions is strikingly noticeable; indeed, if one may be permitted to suggest it, there seems to emerge at times a characteristically mild and academic tone at the point where vital and constructive thinking might have been desired.

Such a criticism could not be passed upon the long final chapter ("Conclusions") which is, in the judgment of the present reviewer, a masterpiece of comprehensive survey and powerful analytical and constructive thinking. The central problem is formulated in the following paragraph:

> These conflicts may best be summed up in one transcendent issue. Compulsory labor, exclusive colonial tariffs, attempts to achieve imperial economic self-sufficiency, the policy of forcing the mother-country's language and culture on the colonies, and insistence on domination, are the ingredients of one form of imperialism that is by no means decrepit or defunct. Protection of native land rights, abolition of compulsory labor, readjusted education policies, the open door, and gradually increasing self-government for colonies capable of it, are policies that belong with a type of imperialism now associated with the word "trusteeship."

For the full appreciation of the meaning of that summary, for suggestions—usually implicit rather than express—regarding a solution of that problem, the whole of the rest of the text provides background. The result is that we have a treatment of modern imperialism which is not merely descriptive and historical, but scientific and artistic in the sense in which the work of the artisan and the engineer is scientific and artistic. We have a real "work."

PITMAN B. POTTER.

International Law. By L. Oppenheim. Vol. II. Disputes, War and Neutrality. Fourth Edition. Edited by Arnold D. McNair. London: Longmans, Green & Co., 1926. pp. lv, 752. Index. $15.00.

Oppenheim's work is too well known to need discussion in these pages. The form and method of treatment has not in general been much changed. The subsequent editors have made many valuable contributions relating to late events in the international field. This is altogether commendable, but it is now necessary that readers have at hand several editions in order to gain a clear conception of some of Oppenheim's own views before they had been thus edited. Accordingly, the question is raised whether in the editing of books on international law which have already become well known, new or changed material should not be indicated by the initial of the editor, by

brackets or some similar device, in order that the reader may easily identify its source.

The third edition of Oppenheim was, unfortunately, unfinished at his death. It was natural that a former Whewell Scholar, Mr. Roxburgh, should endeavor to put in form the work upon which Professor Oppenheim as Whewell Professor had been engaged. Mr. Roxburgh introduced some new material for which he assumed full responsibility, but the changes are not always evident without reference to the preface of the third edition, and now Dr. McNair in this fourth edition says: "I must warn the reader that if on any point he wants the author's *ipsissima verba* he must refer to the second edition, and then examine the third edition in the light of Mr. Roxburgh's prefaces," and also that "a considerable amount of the text of the third edition has been put either into footnotes or into smaller type," and it might be added that sometimes parts of the text itself have been changed or omitted altogether. This can only be discovered by comparing editions page by page. If this method of editing is to continue and a fifth edition should be issued by still another editor, the original point of view of Oppenheim, which a reader might wish to know, would require considerable research to discover.

GEORGE GRAFTON WILSON.

L'Occupation de la Ruhr et le Droit des Gens. By Capitaine E. Poupard. Paris: Les Presses Universitaires de France, 1925. pp. 255. Fr. 25.

The occupation of the Ruhr by the French and Belgian troops in 1923 has been the subject of a fertile discussion from various angles—economic, military, political and juridical. The juridical aspect of the question has, in general, been treated fragmentarily, the discussion being directed especially to the question of the legality of the Allied occupation. In regard to the latter point, the opinion of international publicists has been pretty well divided.

The question of the legality of occupation is not yet definitely resolved. Neither is the question of the legality of the powers exercised by the occupying authorities. The conflict of sovereignties resulting from the presence on German territory of the Franco-Belgian military authorities has drawn to itself but little attention of writers. Yet the study of the jurisdiction exercised by those authorities is of great interest from the point of view of international law.

Captain Poupard treats in his present book the whole juridical phase of the Ruhr occupation. The question of the legality of the occupation is taken up first. Then the purpose, the general character and the organization of the occupation are successively discussed. Finally, the question of the conflict of jurisdictions in legislative, administrative and judicial matters is dealt with at great length.

The thesis of Captain Poupard is that the occupation of the Ruhr was

justified. He invokes in support of his thesis the doctrine set forth by publicists, international custom, and the provisions of the Versailles Treaty. According to the author, the Allies, by occupying militarily and exploiting commercially the German mining basin, had only availed themselves of the means sanctioned by international law and the treaty to coerce Germany to abide by her obligations. The legislative, administrative and judicial powers exercised by the military authorities were likewise justified.

Captain Poupard presents and supports his thesis very ably. Whether one agrees or not with his stand, one must, nevertheless, concede that the book is a valuable contribution to the still undefined field of intervention and occupation.

WADSWORTH GARFIELD.

Le Danube et l'application du principe de la liberté de la navigation fluviale. By Voyslav M. Radovanovitch. Geneva: Société Coopërative d'Impression, 1925. pp. 336.

The preëminent position, both political and economic, which is held by the river Danube was recognized by Napoleon when he characterized it as "the king of European rivers" and by Talleyrand when he said that "the center of gravity of Europe is at neither Paris nor Berlin, but at the mouth of the Danube." In international law the place of the Danube is equally distinguished, for no other international river has been the subject of so many negotiations and discussions as to the right of user, not only by the states which it touches but also by non-riparian states.

The right to navigate great rivers is at bottom a practical question. It is usually claimed primarily because of the economic advantages dependent upon it. It has often been denied because of the feeling by riparian states that they should reserve for themselves whatever economic advantages their position gives them. Such a denial, however, may provoke retaliatory measures by states which are excluded, and the right to use international rivers has therefore been more and more freely accorded. In the case of states occupying the upper course of a river which forms for them a natural outlet to the sea, it is difficult to deny to them, with any show of justice, the right to use the river throughout its course. In the negotiations conducted by Henry Clay for the free use of the St. Lawrence by citizens of the United States, he said, "From the very nature of such a river, it must, in respect to its navigable uses, be considered as common to all the nations who inhabit its banks, as a free gift flowing from the bounty of Heaven, intended for all whose lots are cast upon its borders." In fact he went farther, and with evident reference to Article 109 of the Treaty of Vienna, which declared all international rivers open for commercial purposes to the citizens of all nations, he maintained that this provision should "be regarded only as the spontaneous homage of man to the superior wisdom of the paramount Law-

giver of the universe, by delivering His great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected." The principle which Clay so rhetorically declared to be one of universal application was not everywhere accepted. Some of the signatories of the Treaty of Vienna held that it gave no rights to non-riverain states. In America, Brazil freely admitted that the states upon the upper course of the Amazon were entitled to the free use of the entire river, but when access to those countries by way of the Amazon was sought by the United States, she asserted her exclusive jurisdiction over that part of the river lying within her boundaries, and until September 7, 1867, the Brazilian portion of the Amazon was open to the commerce of only the riparian states. In claiming for American citizens the right to use the Amazon throughout its course, Secretary Marcy, like Henry Clay, appealed to the Treaty of Vienna, which he held to be "but the recognition of the law of nations in regard to the use of navigable rivers passing through different realms." He instructed the American minister to Brazil "to claim for our citizens the use of this natural avenue of trade. This right is not derived from treaty stipulations —it is a natural one—as much so as that to navigate the ocean—the common highway of nations. By long usage it is subject to some restrictions imposed by nations through whose territories these navigable rivers pass. This right, however, to restrict or regulate commerce, carried to its utmost extent, does not give the power to exclude such rivers from the common use of nations."

In recent years there has been a growing feeling that the gifts of nature are not the exclusive property of the political units within whose boundaries they happen to lie, and that the earth and the fulness thereof belong to the human race rather than to any particular branch of it. With the development of international solidarity the argument gains strength, and it is as applicable to natural waterways as it is to forest growths or deposits of minerals. The riparian states are no more responsible for the existence of the Danube or the Amazon or the Mississippi than they are for their natural timber or their minerals. Subject, therefore, to considerations of national safety and to due recompense for expenditures necessary to make such streams usable, it may be expected that the nations will more and more insist that all countries are equally entitled to the use of the highways which nature has provided. Such a development would be but a return to the doctrine of the law of Rome.

The author of the work under review states that all which has hitherto been written upon the right to navigate the Danube has dealt with only certain aspects of the question or has presented the view of one of the interested nations. He has therefore endeavored to treat the entire subject from a legal standpoint from the Roman epoch to the close of the war with Germany. In the execution of this comprehensive plan, he has described historically and theoretically the development of the principle of freedom of

navigation of international rivers. He then takes up the treaty arrangements which have been made with regard to the Danube and discusses the national rivalries which are reflected in them and which have often determined their contents. This is followed by an account of the means taken for carrying out their provisions and particularly of the régime established by the Treaty of Paris of 1856. This topic very properly occupies about one-third of the book. The concluding portion is devoted to the provisions of the Treaty of Versailles of 1919 and to the régime which it created. In the appendix are the articles of the treaties of Versailles, of St. Germain, of Neuilly, and the Trianon which relate to the Danube and the full text of the convention instituting the definitive Statute of the Danube signed at Paris July 23, 1921. There is a list of fifty-eight conventions relating to the Danube and a bibliography occupying eleven pages. The author indicates that he has consulted only a small proportion of the works which he mentions. He states that his bibliography is intended to include "all which we have found written upon the Danube and upon the principle of the freedom of river navigation." His list contains very little which has appeared in the English language. Even such pertinent works as Moore's Digest and Ogilvie's International Waterways are not mentioned. Three closely printed pages are devoted to errata. So long a list, and it is not complete, raises a doubt as to how far the writer's statements of fact may be relied upon without verification. This doubt is increased by such careless statements as that on page 24 to the effect that the treaty of May 30, 1814, was signed "after the defeat of Napoleon I at Waterloo." The book represents great industry, is well arranged, and will be useful as a guide to the many treaties dealing with the Danube.

LAWRENCE B. EVANS.

Some Mexican Problems. By Moises Saenz and Herbert I. Priestly. Chicago: University of Chicago Press, 1926. pp. ix, 175. Index.

Aspects of Mexican Civilization. By José Vasconcelos and Manuel Gamio. Chicago: University of Chicago Press, 1926. pp. ix, 194. Index. $2.00.

These two volumes contain the Norman Wait Harris Lectures for 1926. They constitute a sympathetic exposition of the Mexican political, social, religious, and industrial problems. The basic facts of Mexican civilization are set forth in a clear, candid spirit. One is enabled to understand the issues involved in part in the revolutions which have occurred since 1910. With all due allowance for the personal failings of the various political leaders, one can appreciate something of the difficulties of any attempt to introduce sweeping reforms of abuses which have existed for centuries. It is thus possible to see more clearly the background of the controversy between the United States and Mexico over the legislation recently adopted to

redistribute the land and to restrict the absorption of the national resources by foreigners, notably in the case of petroleum. The general subjects treated by Mr. Saenz are: 1, "Foreign Investments and Mexican Nationalism;" II, "Humanism and the Mexican Laborer;" III, "Integrating Mexico through Education." "Our nationalistic policy," according to Mr. Saenz, "is simply to correct a misplaced emphasis. We are satisfied no longer with Mexico being mother to the foreigner and step-mother to the native." In dealing with the labor problem, the author occasionally employs phraseology strongly reminiscent of Bolshevist literature. In speaking of the general policy of the labor movement toward the Mexican Government, he says: "The labor aims must be cautiously expressed in order not to contribute to American intervention. A proletarian revolution would precipitate intervention immediately" (p. 41).

Mr. Priestly, who is of the Department of History in the University of California, treats of the following subjects: I, "Basic Features of the Mexican Problem;" II, "The Program of Rehabilitation;" III, "The United States and Mexico." He maintains that: "In view of the past territorial expansion of the United States, and her present active expansion in trade and foreign investment, it is but natural that Mexico, because of her geographical location should consider herself the advance guard of the Latin culture, feeling, and political and economic independence. This sentiment has been recently strengthened by Mexican success in launching a program of nationalistic legislation, by the shock to American prestige in the Tacna-Arica controversy, and the political storm in Nicaragua" (p. 143).

Mr. Vasconcelos deals with the following matters: I, "Similarity and Contrast;" II, "Democracy in Latin America;" III, "The Race Problem in Latin America." In summing up the nature of Mexican progress as compared with that of the United States, the author says that "North America has developed in accordance with a law of similarity of races and efforts and conditions while Latin America is struggling along according to a sort of varying rhythm of radical changes and contrasts" (p. 41).

Mr. Gamio presents the following subjects: I, "Incorporating the Indian in the Mexican Population;" II, "The Education of Indo-Hispanic Peoples;" III, "Some Aspects of Diplomatic Relations between the United States and Mexico." He offers the suggestion that all American embassies and legations in Latin-American countries should have, in addition to military attachés and commercial attachés, "a scientific attaché to investigate that most interesting factor in international relations, the human factor; and thereby discover the reason for the social and cultural hostility between the Anglo-Saxon and Indo-Hispanic elements on this continent, and propose the remedy for such a situation" (p. 186).

PHILIP MARSHALL BROWN.

Les Traités de Conciliation et d'Arbitrage conclus par la Suisse, de 1921 a 1925. By Dietrich Schindler. Lausanne: Librairie Payot & Cie, 1926. pp. 115. Fr. 3.

This volume, being a reprint from the *Revue de Droit international et de Législation comparée* (1925, No. 6), with the addition of texts, deals with a group of treaties which appear to embody the most advanced plans for obligatory arbitration actually adopted in international agreements up to 1926. The discussion covers fourteen treaties concluded by Switzerland (with Germany, Sweden, Denmark, Hungary, Brazil, Italy, Austria, the Argentine Republic, Japan, Belgium, Poland, France, Norway and Greece respectively) from 1921 to December, 1925.

The treaties are classified according to their nature and scope. Eleven of the agreements, providing for conciliation procedure to supplement arbitral or judicial processes, open the way to a large use of conciliation bodies. Several of the signatories are states which have accepted with Switzerland the optional clause of the Statute of the Permanent Court of International Justice. The two treaties with American Republics provide only for judicial or arbitral settlement; either party may withhold questions on the ground that its constitutional principles are affected. The treaty with Japan provides for judicial settlement only, and includes a still wider reservation clause. The treaties with Italy, France, and Greece, with provisions intended to cover all disputes arising between the signatories, are referred to as marking the highest point of the movement toward general obligatory arbitration.

Various questions with reference to obligatory amicable procedure are taken up. Perhaps of greatest interest to American students of the subject are views presented with respect to (1) the nature of a *compromis*, the author believing that to regard a *compromis* as a formal treaty is not logical (p. 44); (2) the meaning of clauses requiring that diplomatic efforts at settlement be exhausted before a case may be referred to arbitration (pp. 32, 33); (3) what constitutes a *jugement définitif* (of a municipal court) preceding arbitration (p. 34); (4) obligations of certain members of the League of Nations to follow procedure prescribed in these treaties before appealing to the Council (pp. 56, 57). A fuller treatment of the effect of settlements made on the basis of equity, on which some of the author's conclusions do not seem consistent (pp. 50, 61, 62), would be desirable. Some constitutional difficulties which the Swiss may experience in carrying out provisions of the treaties have been anticipated.

The value of this brief but careful study is readily appreciated. The usefulness of the volume is increased by the inclusion of complete texts of the fourteen treaties.

ROBERT R. WILSON.

Das Völkerrechtliche Mandat. Von Dr. Wolfgang Schneider. Schriften des Deutschen Ausland-Instituts Stuttgart, Rechts-und Staatswissenschaftliche Reihe. Band 2. Stuttgart, Ausland und Heimat Verlags-Aktiengesellschaft, 1926. pp. 103. 3.20 mks.

This juristic treatise is marked by keen legal analysis, but marred by a tendency to emphasize distinctions without a difference and to ignore facts for theory.

In the first part the author discusses the origin and development of the mandate conception with extensive use of Professor Potter's article in the American Political Science Review for November, 1923. The main credit for the device he gives to General Smuts, though he finds that the six principles which it embodies, no annexation, tutelage of backward nations, international supervision, no military use of natives, self-determination, and the open door, had each a separate history. He agrees with Potter that President Roosevelt brought most of these principles together and applied the term "mandate" in his correspondence over Morocco before the Algeciras Conference, but "the suggestion remained without permanent practical significance and fell again into oblivion" (p. 31).

In the second part the author defines the term mandate as used in international law, distinguishes it from colony, protectorate, colonial protectorate, and the mandate of civil law and concludes that it is a legal conception *sui generis*. The difficult subject of sovereignty of mandated territory may be approached through study of the location of ultimate legal authority in present practice, or through examination of past transfers of the territory. The first method views sovereignty as the supreme power of governing the area, while the second assimilates it to property in real estate. Schneider follows the second method. Germany had title which she passed by Article 119 of the Treaty of Versailles to the Principle Allied and Associated Powers which, by Article 22 of the same treaty, agreed to dispose of the territory as mandates "in the name of the League of Nations." Thus sovereignty is vested in a "co-imperium" (which term he prefers to the older "condominum") of the Principle Allied and Associated Powers and the League of Nations (pp. 39, 41). He considers the mandate instrument as a treaty between this "co-imperium," on the one hand, and the mandatory, on the other, by which the latter is given certain powers of administration.

Looking at realities, it is hard to distinguish between this "co-imperium" and the League Council, since the latter includes as permanent members all the Principle Allied and Associated Powers except the United States, which Schneider eliminates from any legal title because of its failure to ratify the peace treaties (p. 39). It is also hard to overlook the reality of the mandatory's power which in the "C" mandates, at least, makes a close approach to sovereignty.

The "A" mandates are more difficult to analyze because of the failure of

Turkey to ratify the Treaty of Sèvres and the quasi-recognition of the native states, but our author succeeds in fitting them into the same formula.

In a final part the three classes of mandates are discussed. The "B" mandates in Central Africa are nearest normal, as they incorporate all the six principles except self-determination. Class "C" ignores both self-determination and the open door. For "A" mandates the Covenant recognizes self-determination to some extent in theory, though, except for Iraq, this has been ignored in practice and it does not require the open door, though the mandates do in part.

The book does not deal with the practical problems or influence of mandatory administration and supervision, but merely with legal theory. It is provided with a bibliography and the texts of all the mandates are printed in English in appendices.

QUINCY WRIGHT.

Le Droit des Gens et la chine Antique. Vol. I, Part I. *Les Idées.* Par Siu. Tchoan Pao. Paris: Librairie de Jurisprudence Ancienne et Moderne, 1926. pp. 181.

This volume, consisting of two chapters and an epilogue, supplies abundant evidence that the author has come largely under the influence of the French Catholic School of Sinologues as a guiding influence, as also under that of the Religious Pacifist School of Thought. Indeed, a cursory reading of the names in the appended bibliography supplies definite evidence that the main sources of the author's information is confined to certain obvious Chinese works, such as those of Se-Ma-Tsien and the classics, as also the works of Mailla, Chavannes, Wieger and others belonging to the Missionary School of Thought. Indeed, out of 37 names given, 25 come from Chinese and French sources, and yet even with this array one misses such names as those of Paul Pelliot, Terrien de la Couperie, de la Charme, Amiot, Abel Remusat, Pauthier, whose work in oriental records and history are sufficiently known. The same can be said of such men as Dr. Wilhelm of Frankfort, Prof. E. H. Parker, Prof. R. K. Douglas, D. C. Boulger, whose volumes on oriental history are not lightly to be dismissed as sources of Chinese methods and manners, when dealing with external diplomatic questions involving the rights of foreigners.

In the introduction (p. 17) attention must be called to a misapprehension of the author concerning the late Dr. W. A. P. Martin which is contained in the paragraph saying "Ait cru pouvoir se proclamer le premier professeur de Droit International en Chine." This statement finds but little confirmation in Dr. Martin's book, A Cycle of Cathay, (p. 311), where he carefully states that nine foreigners were appointed to the staff of the newly reorganized Tung-Wên-Kuan, of which number he was, not only the professor of international law, but in addition the president of the institution; nor is

there any indication of such a claim in his letter to Monsieur M. G. Moynier of Geneva, under date of July 21, 1885, in which he comments freely upon the traces of international law and practices in ancient China. This letter appears to be a résumé or restatement on a smaller scale of the details of his paper read at Berlin on September 13, 1881, before the Congress of Orientalists, in which also no such claim appears. None the less Dr. Martin was the first American ever appointed to the Tung-Wên-Kuan, now merged in the National University of Peking, and was thus perhaps the first foreigner so honored. It should, however, not be forgotten that diplomatic duties on behalf of the Chinese had been performed by foreigners long before Dr. Martin ever set foot in China, a notable case being when Père Gerbillon and Père Pereyra accompanying the Chinese delegation in 1689 to Nertchinsk, when and where a treaty was signed with the Russians, at which the two fathers acted as interpreters and actually wrote the Latin copy of the treaty.

The reference (p. 29) to the "Speciale d'agents diplomatiques nommés Voyageurs" is of interest as indicating that Mr. Siu is well acquainted with the Chou-Li, in which volume the six departments of ancient Chinese government are described with considerable minuteness. But it would appear that the offices of Ta-Hing-Jen and Hsiao-Hing-Jen are somewhat exaggerated by the author when comparing the work of these two officials with that done by those of a modern Bureau of Foreign Affairs. The Ta-Hing-Jen was in charge of many duties which naturally increased in volume as the area controlled by the Chinese Emperor increased. He was the chief person in charge of the reception of ambassadors from tributary states and foreign countries, and consequently had in his power all the police officials for the protection of strangers and foreign officials. But the main duty of "the Great Traveler" and "the Little Traveler," as Monsieur Biot has named them, was to inspect conditions of the vassal and feudatory states; keep records of the condition of their population and trade; while they also had to keep full information ready for the Emperor upon all that was happening within the Empire, and when he traveled to have at hand, maps, charts and lists of officials in each section of government; to supply interpreters and recorders for each journey, much of which was in reality the work of what in modern times would be assigned to a Department of Interior, as well as to special court officials whose function it is to regulate ceremonies connected with audiences. Though the history of the oriental countries indicates more or less continuous contacts between Eastern and Western oriental states, ambassadorial functions were not in those times comparable to the duties falling to the residential minister or ambassador of today. Thus Dr. Siu tends to claim too much in his account for these functionaries in what he calls the period of the "Ecole Pacifiste."

In the section dealing with the comparisons and analyses of certain "determined principles," the main interest lies in the manner in which

Mencius and his ideals are compared with those of Rousseau; and those of Confucius with Kant, as also the ideals of Mo Ti with Kant. But space forbids any detailed examination of these comparisons, beyond saying that generally in the development of any country there will be found philosophers and teachers who present to their fellow countrymen the doctrines of altruism in contradiction to those of egotism.

The principles of Mo Ti might be called ultra altruistic, while those advanced by Yang-Chou were perhaps ultra egoistic. Throughout writings of these leaders of Chinese philosophy, just as in those of Confucius and Mencius, there can be traced conceptions which are similar to those of Christianity and which no doubt were fostered amongst a people like the Chinese, who were then, as now, as idealistic as they are imaginative, being easily moved by ceremonies and precise forms. It is to be hoped that any subsequent volume will betray a more liberal attention to the researches of the non-Catholic scholars of China and its diplomatic history.

BOYD CARPENTER.

Geneva Opium Conferences: Statements of the Chinese Delegation. By Sao-ke Alfred Sze. Baltimore: The Johns Hopkins Press, 1926. pp. vii, 163. $1.50.

This little volume contains "the more important of the statements made by the Chinese Delegation in the two International Opium Conferences held at Geneva in the winter of 1924–25." The several statements were made by Sao-ke Alfred Sze, Chinese Minister at Washington and Chief of the Chinese Delegation, who adds a brief foreword and an introduction. The text has been taken from the Minutes and Proceedings of the two Opium Conferences as published by the Secretariat of the League of Nations. The present publication was designed to present in a brief but authentic manner the views expressed by the Chinese representatives, to correct misleading newspaper reports sent out to China, and incidentally to arouse the Chinese press to a realization of the necessity of organizing a foreign news service of their own. These ends, except in respect to a Chinese news service, may be attained by this volume. But it labors under a very real defect in being only a small part of the record. The replies of the Chinese Delegation to the criticisms of foreign representatives are given in full, but the criticisms are not printed, so the reader has no way of passing judgment on the arguments advanced by both sides. From the text it is evident that many criticisms of the widespread cultivation and use of opium in China were made by other delegates. These charges were rather summarily dismissed and the Chinese replies were directed against the sale and consumption of opium in foreign territories adjacent to China.

PAYSON J. TREAT.

The New Democracy: Presidential Messages, Addresses, and Other Papers (1913–1917). By Woodrow Wilson. Edited by Ray Stannard Baker and William E. Dodd. 2 vols. New York and London: Harper and Brothers. 1926. pp. xxv, 450–xi, 505. Index.

These volumes constitute the second installment of the authorized edition of the public papers of Woodrow Wilson. They were preceded in 1925 by two volumes entitled "College and State," containing educational, literary, and political papers written by Wilson between 1875 and 1913. The series will be completed by two more volumes which will cover the World War.

The present volumes relate to Wilson's first administration. They contain 140 papers, beginning with the first inaugural address and closing with the address to the country at the end of the Sixty-Fourth Congress on the "Little Group of Wilful Men" who had prevented the Senate from acting on the proposal to arm merchantmen. The bibliography for these four years at the end of Volume II contains about 270 items, so that the editors have included in their collection a little over half of the papers of this period. They have selected all the more important papers, particularly those showing the evolution of policies and programs, omitting some that were repetitions of ideas already expressed and others that were of minor importance, such as occasional addresses to gatherings of various kinds that met in Washington, and papers of merely personal or temporary interest.

Wilson's state papers will grow in value and interest with the lapse of time, for in intellectual content and literary style they equal those of any of the great statesmen of modern times. Furthermore, a consistent political philosophy underlies and pervades them all. In this respect Jefferson and Wilson stand alone among American presidents. They were the only two whose political careers were guided by definite bodies of doctrine. H. W. V. Temperley, in his History of the Peace Conference at Paris, says of Wilson: "His ideas, like those of no other great statesman of the war, are capable of being worked out as a complete political philosophy."

Although temperamentally unlike, Wilson and Jefferson had much in common. In his earlier life Wilson was not a thorough-going democrat and not an admirer of Jefferson, but he finally reached the same goal of democracy and faith in humanity. His eventual faith in democracy was not a spontaneous enthusiasm, but a well reasoned conclusion, which late in life, when confronted by great problems of government, he carried to its logical limits. Jefferson and Wilson were by natural inclination aristocrats, as most great intellectuals are; they were democrats by conviction. Neither was ever personally very close to the people. In this respect they differed from Lincoln, who believed in the people because he was one of them.

Had Wilson's lot been cast in England, he would have been a great debater and a great parliamentary leader. While he believed in carrying out the will of the people, he believed it was necessary for someone to interpret that will, to formulate it and give it definite expression, and so he essayed the rôle

of Premier-President. He came into the presidency with a very definite legislative program, and no other President has ever succeeded in putting through a reluctant Congress so many important constructive legislative measures. The Mexican question and the European War, which forced themselves so soon and so unexpectedly upon his attention, were doubtless at first distracting annoyances, but they soon absorbed his attention and challenged the best that was in him. In handling the questions that so rapidly pressed for solution, he was no mere opportunist. As he said in his address at the Gridiron Dinner in 1916: "The point in national affairs, gentlemen, never lies along lines of expediency. It always rests in the field of principle. The United States was not founded upon any principle of expediency; it was founded upon a profound principle of human liberty and of humanity, and whenever it bases its policy upon any other foundation than those it builds upon the sand and not upon solid rock." (Vol. II, 125.)

These were not mere words; they were convictions. Reading Wilson's papers again after the lapse of a brief decade one is impressed by the unity and consistency resulting from the underlying principles he applied. While the papers are arranged chronologically, the thoughtful reader will find it interesting and profitable to read them topically, taking such subjects as his general philosophy as expounded in his first inaugural address and in the paper "Freedmen need no Guardians," his legislative program, the Mexican question, his larger Latin-American policy, neutrality, and preparedness. Many of the views and expressions that excited such controversy at the time now appear altogether reasonable.

The editors have done a good piece of work and have earned the gratitude of the public.

JOHN H. LATANÉ.

Les Conflits Nippo-Américains et le Problème du Pacifique. By M. Yoshitomi. Paris: A. Pedone, 1926. pp. xv, 388.

The title of this work is somewhat misleading. It is not a history of the various international disputes between Japan and the United States, but a survey and discussion only of the issues of immigration and discriminatory treatment of Japanese residents in America. For these closely related topics, it gives an excellent presentation of the Japanese point of view. The history of the controversy, the critical analysis of the factors involved, and the study of the underlying legal principles are given in a clear style and with a wealth of quotations from laws and well-known legal authorities. Writing as the author does under the sense of a deep wrong inflicted upon his countrymen, he is scholarly, but not impartial. The chief value of the volume is that it holds up a mirror in which Americans may see their country and its policies as they appear to many thoughtful Japanese.

The volume is divided into two parts: first, a history of the development in

the United States of antagonism to Japan, and, second, a critical study of this antagonism. In part two, the assimilability of the Japanese is first considered, and the conclusion is reached, after a study of the psychological, social, and biological aspects of the problem, that Japanese are not only able to assimilate American civilization, but that they do so more readily than many of the races of Europe. To mixed marriages the author finds no objection. The charge that Japanese on the Pacific coast may become an economic danger is regarded as unfounded. In fact, it is stated that American opposition to Japanese is based solely upon racial prejudice, accentuated by jealousy of the rapid rise of Japan to power. Of particular interest is the study of the legal principles involved. Discarding the doctrine of unrestricted sovereignty as obsolescent, and taking as his fundamental principle the interdependence of nations, the author reaches the conclusion, supported by quotations from many legal authorities, that states may not rightfully refuse foreigners the privilege of admission unless it should be strictly necessary for self-preservation; and that, by right, states which have large territories and great wealth, such as the United States, Australia, and Canada, should open their doors freely to the peoples of lands less fortunate. Immigration laws there may well be, but the tests prescribed for admission should be based upon the qualifications of individuals and not upon national or racial origin. From the legal point of view, the present attitude of the United States is regarded as a serious crime against the reign of law and the principles of humanity.

The general attitude of the United States and the outlook for the future are considered briefly in the closing chapter. An imperialistic power, actuated by a narrow nationalism, the United States attempts to maintain selfish and conflicting policies. By the Monroe Doctrine it aims to exclude all Japanese interests from both American continents, while by the Open Door Doctrine it insists upon equal privileges in Asia. Material peace in the Pacific, the author concludes, can exist only if there is moral peace, and moral peace can exist only if between the Pacific states there is mutual respect, international courtesy, and a policy based upon equity and justice.

GEORGE H. BLAKESLEE.

BOOK NOTES

International Maritime Committee. Bulletin No. 74. Genoa Conference, September 1925. Antwerp: J. E. Buschmann, 1926.

The volume, reporting the Genoa Conference of September, 1925, contains also documents which had been submitted to the International Maritime Committee. The main topics were: (1) Compulsory Insurance of passengers, (2) Immunity of State-owned Ships, (3) International Code of Affreightment, (4) Maritime Mortages and Liens. Some of these topics had received much consideration at prior meetings, and particularly that of Immunity of

State-owned Ships was regarded as in form for presentation to governments for action. The general principle proposed that claims against such ships should follow the usual course of maritime claims unless the state should be operating the vessel in non-commercial service, as in surveying or hospital service, when claims should go to the court of the state owning the vessel. Such vessels were to be similarly exempt in time of war if the owner was belligerent. The subject of compulsory insurance of passengers was discussed at length. Other matters were given less attention.

Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International. By Heinrich Triepel. Troisième Série. Première Livraison. Leipzig, 1927.

This volume continues the well-known *Grand Recueil* of de Martens. It contains forty-three agreements negotiated since 1919. Not all of these included in the volume have been ratified, but all are of importance as showing the course of international negotiation.

REVIEW OF CURRENT PERIODICALS

By Charles G. Fenwick

1. American Bar Association Journal, November, 1926

International Law: Its Acceptance and Enforcement in the United States, by Charles Pergler (pp. 774–780), surveys the subject historically, with references to court cases. The author takes exception to Professor Potter's opinion that treaties and customary international law are "of authority superior to national statutes."

Ibid., December, 1926. *China Today: Tariff, Extraterritoriality and Other Problems*, by Silas H. Strawn (pp. 827–832), is an appraisal, by the chairman of the International Commission on Extraterritorial Jurisdiction in China and the delegate of the United States to the Special Conference on the Chinese Customs Tariff, of the chief issues in the relations of the leading powers with China. The conclusion is reached that "extraterritoriality, unequal treaties, imperialism and the other slogans" have nothing to do with China's troubles, which are primarily internal.

Ibid., January, 1917. *Law Reform in Turkey*, by Manley O. Hudson (pp. 5–8), points out the necessity of studying the recent changes in the light of the revolution of which they form a part, and shows the traces of the capitulatory régime in the new arrangements. The reforms are of a radical nature: Turkish law has been completely secularized and a code of law adopted in 1926 which is a virtual translation of the Swiss Civil Code of 1912. The article throws light upon the treaty of Lausanne, recently rejected by the Senate, in respect to judicial institutions under the new order, as well as the personal status and family law of foreigners in Turkey.

2. American Law Review, January–February, 1927

The Legality of Chemical Warfare, by Russel H. Ewing (pp. 58–76), after announcing that "in defiance of facts, experience and history the nations of the world are still striving to outlaw chemical warfare," sketches the efforts made in the past to control chemical warfare, with special reference to the Washington Conference of 1921. No mention is made of the Geneva Protocol concerning Chemical and Bacteriological Warfare, but ridicule is directed against the appeal of the French delegate at Geneva in 1925 for the outlawry of poison gas.

3. American Political Science Review, August, 1926

Notes on International Affairs, edited by Bruce Williams (pp. 634–646), contain a description by the editor, first of the Special Assembly of the

League of Nations, which convened at Geneva in March, 1926, for the purpose of admitting Germany into the League, and secondly of the League Commission on the Composition of the Council. The note on the Special Assembly concludes with the observation that "all this struggle over Council seats is the most genuine testimonial yet offered to the position which the League has acquired in international affairs."

Ibid., November, 1926. *The Government of Iraq*, by Quincy Wright (pp. 743–769), points out that the government of Iraq represents a compromise of Wilsonian ideas based upon abstract principles of justice to backward countries, the British traditions of colonial government, and the actual conditions of the territory and the people. Each of these influences is next examined in detail, and this is followed by a sketch of the machinery of the government and of the degree of supervision exercised by the League of Nations. *Notes on International Law* (pp. 842–860), contain a contribution by Pitman B. Potter on "The Origin of the System of Mandates under the League of Nations," in which the writer adds some further notes to an article on the same subject which appeared in the *Review* in November, 1922, and replies to critics of his position there taken that the idea of the mandate system originated in discussions carried on by President Roosevelt and Secretary Root with German and French representatives in Washington at the time of the Conference of Algeciras. A note by Dayton Vorhees, "The League of Nations: a Corporation, Not a Superstate," after defining what may reasonably be meant by a "superstate," rejects that term as applied to the League and shows how the League may more properly be held to have the characteristics of a corporation. A note by Henry M. Wriston describes the sixth session of the Williamstown Institute of Politics, held in 1926.

Ibid., February, 1927. *Notes on International Affairs* (pp. 128–144), contain a useful contribution by Norman L. Hill on "The Allocation of Expenses in International Organization," an argument by Edward A. Harriman on "The League of Nations a Rudimentary Superstate," and a note from Denys P. Myers on "Responsibility for Violation of International Law" apropos the decision of the Greek Supreme Council of Inquiry in the case of General Pangalos.

4. Columbia Law Review, June, 1926

The Senate Reservations and the Advisory Opinions of the Permanent Court of International Justice, by David Hunter Miller (pp. 654–670), points out the relation between Article 14 of the Covenant of the League of Nations and the provisions of the Statute of the Court, and goes on to examine both the legal and the probable practical effects of the right reserved by the United States to give its consent to the jurisdiction of the court in a case in which the United States has or claims an interest. The writer concludes by endorsing [June, 1926] the desire of the existing members of the court to meet in conference to decide upon the effect of the Senate

reservations, and expresses the belief that the advisory opinions of the court have made "a notable contribution to international jurisprudence."

5. Foreign Affairs, October, 1926

The Reconstruction of Hungary, by Sir Arthur Salter (pp. 91–102), outlines the problems involved in the work of financial reconstruction undertaken by the League of Nations in 1925 and completed on June 30, 1926. Contrasts are drawn between the problems presented by Austria and Hungary respectively, and the special difficulty presented by the political situation in Hungary is pointed out.

Ibid., January, 1927. *The Grouping of Nations*, by Archibald Cary Coolidge (pp. 175–188), analyzes the principles upon which nations have grouped themselves in the past and takes up the special conditions attending the formation of more recent groups, such as those of Pan Europe, Pan America, and the British Commonwealth of Nations.

6. Illinois Law Review, May, 1926

The Execution of Foreign Judgments: a Study in the International Assimilation of Private Law, by John H. Wigmore (pp. 1–13), deals briefly with one of the most important problems of the conflict of laws, and is accompanied by an extract from the proceedings of the International Chamber of Commerce Committee on Exequatur and Bankruptcy, which met at Paris, March 30–April 1, 1925, together with the draft convention adopted by the Committee and the report of the Committee of European Jurists on the Enforcement of Foreign Judgments.

7. Michigan Law Review, December, 1926

International Unions for the Protection of Industrial, Literary and Artistic Property, by M. Ostertag (pp. 107–123), reproduces an address by the Director of the United International Bureaux of Industrial, Literary and Artistic Property at Berne, delivered before the European Conference of American Professors of International Relations at Geneva, August 30, 1926. A description is given of the organization of the two unions and of the law governing their activities. Special attention is given to the Madrid Arrangement of 1891 concerning the registration of trade-marks and the arrangement for the suppression of false indications of origin. The speaker concluded with an expression of the desirability of the adhesion of the United States to the Literary and Artistic Union.

Ibid., February, 1927. *Sidelights on the Permanent Court of International Justice*, by Ake Hammarskjold (pp. 327–353), reproduces an address by the Registrar of the Permanent Court delivered before the Conference of American Professors on August 11, 1926. Among other topics the address describes the procedure followed by the court in its private discussion of

pending judgments and opinions, the preparation of majority and dissenting opinions, the equality of parties before the court, the right of the court to refuse to give advisory opinions, the organization and work of the Registry of the court, and the relations between the Permanent Court of International Justice and the Permanent Court of Arbitration. As the author is doubtless the best informed person in the world upon the subject, his observations are of singular importance.

8. University of Pennsylvania Law Review, December, 1926

Developments in Aërial Law, by Roger F. Williams (pp. 139–153), outlines the efforts to adopt an international rule for the navigation of the air, first in connection with instruments of warfare and later in its more general aspects. At the same time aërial navigation acts were adopted by a number of individual states. The difficult question of the sovereignty of the air space over a nation's territory was finally settled in 1919, although the United States has not as yet ratified the convention. Since that time the chief interest of American lawyers has been to decide whether domestic control of air navigation shall be by individual states or by federal legislation, the issue being met in part by the passage by Congress of the Air Commerce Act of 1926.

Ibid., March, 1927. *The Nationalization of Joint Stock Banking Corporations in Soviet Russia and its Bearing on their Legal Status Abroad*, by Paul Wohl (pp. 385–410), is a translation of an article originally appearing in Ostrecht for November, 1925. The writer refers to recent decisions of the German, American, British, French and Swiss courts, and then proceeds to examine the various Soviet decrees and their intra-Russian effects.

Ibid., April, 1927. *Modern Developments of the Law of Prize*, by F. Cyril James (pp. 505–526), undertakes a brief survey of the most fundamental among the many changes that the World War brought about in this field of jurisprudence. After pointing out that in 1914 the law of prize remained in much the same form that it had been given by Lord Stowell during the Napoleonic wars the writer sketches the general rules of international law upon the subject and then goes on to examine in detail the leading decisions of the British courts. Stress is laid throughout the article upon the inapplicability of the old rules to modern conditions. *The Nationalization of Joint Stock Banking Corporations in Soviet Russia* (pp. 527–543), continues the study begun in the March issue and deals in further detail with Russian domestic legislation.

9. St. Louis Law Review, February, 1927

Recognition in International Law, by O. H. Thormodsgard and R. D. Moore (pp. 108–117), examines briefly the general question in the light of the special situation created by the decrees of the Bolshevik Government of Russia.

10. YALE LAW JOURNAL, November, 1926

The International Copyright Union, by Thorvald Solberg (pp. 68–111), is a careful and detailed examination of the early history of international copyright protection and of the failure of the United States to adhere to the Copyright Convention of 1886 and its subsequent amendments. The formulation of the text of the international convention is described and is followed by a study of the provisions of the Berlin Convention of 1908. The writer explains and comments at length upon the effects of the failure of the United States to become a member of the Copyright Union and concludes with an analysis of the Perkins Bill and the Vestal Bill which were under consideration by the last Congress, both of which contemplate a general revision of our copyright laws and the adhesion of the United States to the convention creating the Copyright Union.

Ibid., December, 1926. *Some Suggestions concerning the International Trade-Mark Situation*, by Edward S. Rogers (pp. 235–244), describes the serious losses that may befall a manufacturer engaging in foreign trade as a result of the present inadequate protection given to trade-marks. The two divergent theories of the common law and continental law are pointed out, and the conflicting results in respect to statutory protection at home and abroad. Footnotes contain the report of the International Chamber of Commerce on the unification of the laws governing trade-marks, together with an abstract from the provisions of the pending Vestal Bill.

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THE GRADUAL AND PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

By James Brown Scott
Honorary Editor-in-Chief

On Monday evening, April 18, 1927, his Excellency Octavio Mangabeira, Minister of Foreign Affairs of Brazil, formally opened the International Commission of American Jurists for the Codification of International Law, Public and Private, in the city of Rio de Janeiro, in the Monroe Palace, in the presence of the official representatives of seventeen of the twenty-one American Republics, having before them, as the bases of their labors, the projects of public and private international law drafted by the American Institute of International Law. On Friday afternoon, May 20, 1927, he formally adjourned the International Commission of American Jurists, which had to its credit twelve projects of public international law, and a code of private international law of no less than 439 articles, which the Commission had, within the short space of five weeks, put into shape primarily from the projects of the American Institute of International Law. It is the purpose of the present article to show how this Commission, the first official body which successfully and consciously endeavored to codify the two branches of international law, accomplished the purpose for which it had been created and assembled.

The first and second Hague Peace Conferences, meeting respectively in 1899 and 1907, had endowed the world with well-nigh perfect specimens of the gradual and progressive codification of the law of nations. Various conferences at The Hague for private international law had drafted a number of conventions. In the case of the peace conferences, codification was incidental and, it may be said, a by-product of their diplomatic negotiations. They were not gatherings of official delegates of the nations at large for the sole purpose of codifying international law; the two subjects of public and private international law were kept separate, and they were separately treated by different and independent conferences at The Hague. The International Commission of Jurists met with the avowed, conscious, official purpose of codifying both public and private international law, and it succeeded to an unexpected degree in both.

The Hague Conferences on public and private international law succeeded because of the work of the Institute of International Law from its organization in 1873 to the date of the conferences, one of its purposes being "to give support to every serious attempt for the gradual and progres-

sive codification of international law." (Statutes, Art. 1, par. 3.) The International Commission of Jurists succeeded because of the preparatory labors of the American Institute of International Law, founded in 1912, for the purpose of aiding, not merely the gradual and progressive codification of international law, but its codification by the American Republics through their international conferences.

It is the result of such experience as we have had that the intervention of governments through their political powers is most effective and beneficial in matters of this kind at the end, instead of at the beginning of the process, in order to give the effect of law to projects which have been prepared in advance by unofficial bodies, free to express their opinions without being bound by instructions from their respective governments, although they would necessarily have in mind the practice of nations.

The most striking illustration of the wisdom of applying political power at the end instead of at the beginning of the process is shown by Mr. Root's insistence at the meeting of the Advisory Committee of Jurists at The Hague to formulate plans for the establishment of a Permanent Court of International Justice, of which committee he was a member, that unofficial bodies should suggest the candidates for the court without the intervention of their governments, who, however, should be chosen by the action of their governments. On the same occasion, Mr. Root recommended the meeting at stated periods of international conferences for the advancement of the law of nations, before which should be laid the labors of scientific bodies devoted to international law, mentioning specifically, and in first place, the Institute of International Law and the American Institute of International Law.[1] This was in 1920.

Three years later the Fifth International Conference of American States (one of the series commonly called the Pan American Conferences) met at Santiago de Chile. Of the twenty-one American Republics, eighteen were represented by their official delegates, who, on April 26, 1923, unanimously adopted a resolution to the effect that an International Commission of Jurists should be created by the appointment of two delegates from each of the American Republics, to meet in the near future in Rio de Janeiro for the purpose of codifying public and private international law. In the case of the law of nations, the codification was to be gradual and progressive, according to the formula of the Institute of International Law; in private international law, which the English-speaking world prefers to call the conflict of laws, the Commission was directed to prepare a code, instead of a series of projects. It was because of this resolution that the International Commission of Jurists met at Rio de Janeiro in 1927, although it had been the desire

[1] For the history and text of this resolution, *see* The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists. Report and Commentary by James Brown Scott, published by the Carnegie Endowment for International Peace (1920), pp. 133–138.

of the conference, as stated in its resolution, that the Commission should meet two years earlier.[2]

Mr. Charles Evans Hughes was then Secretary of State of the United States, and, knowing from his experience as a former justice of the Supreme Court of the United States, that arbitral tribunals and courts of international justice need law for their awards or decisions, and, as Secretary of State, that ministries of foreign affairs require law for the control of their conduct, he was anxious to have the resolution of the conference carried into effect. He was apparently of the opinion that the International Commission of Jurists should not meet without projects of public and private international law for the consideration of its members, and that these projects should be prepared well in advance of their meeting by a body of American jurists acting upon the request of the American Republics, but without instructions from their governments, as their "sole authority should rest on the inherent truth and knowledge of their own *proclama*," to quote one of Francis Lieber's happy phrases. Therefore, Mr. Hughes inquired whether the American Institute of International Law would undertake the preparation of projects of public international law, and, being informed in the affirmative, he proposed to the Governing Board of the Pan American Union at Washington, on January 2, 1924, that the American Institute of International Law should be invited to prepare a series of projects dealing with the law of nations, to be transmitted in due course to the International Commission of Jurists.[3] The invitation was extended and accepted.

On March 2, 1925, when the thirty projects of public international law of the American Institute were presented to the Pan American Union by Secretary Hughes, he proposed that the American Institute be requested "to prepare a project or series of projects embodying the principles and rules of private international law for the consideration of the commission of jurists."[3] This invitation also was complied with, and a code of private international law, consisting of 435 articles, was laid before the Governing Board of the Pan American Union by Secretary of State Kellogg on February 3, 1926.[4]

[2] For the text of this resolution, *see* Report of the Delegates of the United States of America to the Fifth International Conference of American States (Washington, Government Printing Office, 1924), Appendix 14, p. 131.

[3] For the texts of these documents, *see* Codification of American International Law—Projects of Conventions prepared at the request on January 2, 1924, of the Governing Board of the Pan American Union for the consideration of the International Commission of Jurists, and submitted by the American Institute of International Law to the Governing Board of the Pan American Union, March 2, 1925 (Pan American Union, 1925); also in Special Supplement to this JOURNAL, Oct., 1926 (Vol. 20, pp. 279–387).

[4] The texts of these articles, with documents relating to their preparation by the American Institute and presentation to the Governing Board of the Pan American Union, will be found in a pamphlet entitled, Codification of American International Law; A project of a Code of Private International Law, prepared at the request, on March 2, 1925, of the Governing Board of the Pan American Union for the consideration of the International Commission

For some time past, the codification of international law, both public and private, has been much discussed. There seems to be a confusion in the minds of many who speak of codification, as to the sense in which it is to be understood. To the lawyer, it has a technical meaning: it is a statement in the form of a code, of the principles of international law, which law, itself, may be said to be the rules of conduct which the nations have agreed to apply in their mutual intercourse. It is these rules which are to be codified. In the popular sense, for codification is popular, it is taken to mean a statement in the form of a code, or of articles, not merely of existing practice, but also of the rules which, in the opinion of the layman, should control the conduct of nations. It is one thing to state the law of nations from usages and customs, treaties and conventions; it is quite another thing to create the law which is being stated. The one is the task of the patient investigator who dares not go beyond his authorities; the other is the mission of the reformer, who uses the authorities in order to make the law which he professes to state.

The members of the International Commission of Jurists regarded it as their duty to state the law as they found it embodied in the practice of the American Republics, leaving it to the representatives of the American Republics meeting in conference to propose additional rules which, when ratified by their respective governments, would become the rule of conduct for the Americas. Such a conference, the sixth of the series, is to meet on January 16, 1928, in the City of Habana, in the Republic of Cuba.

Fortunately, it is no longer necessary to argue in favor of codification; there is a consensus of opinion that the rules of international law should be certain, and that they can be stated with precision in the form of a code. The next question is whether codification is to be undertaken through the delegates of the nations in conference assembled, or by unofficial bodies organized for the advancement of international law, or by private persons, such as publicists, writers of authority on the law of nations. All three contribute in various ways. Writers of authority state in systematic form the rights and duties of nations, and their treatises may be considered as the depositaries of international law. Unofficial bodies contribute to codification by framing resolutions, or, indeed, projects dealing with certain phases of international law, giving to their resolutions or projects the form of articles. But it is only through the acceptance by nations of the principles of writers and the resolutions or projects of unofficial bodies, that they obtain the force of law.

The subject ceased to be theoretical during the Civil War which raged in the United States from 1861 to 1865. President Lincoln and his advisers considered it necessary to have prepared "Instructions for the Government of Armies of the United States in the Field." Francis Lieber, Professor of

of Jurists, and submitted by the American Institute of International Law to the Governing Board of the Pan American Union, February 3, 1926. (Pan American Union, 1926).

Political Science in Columbia College, now Columbia University, in the City of New York, was requested to draft the instructions. He gave to them the form of a code, and they were published by the War Department in April 1863, as General Orders No. 100.

In writing, under date of February 20, 1863, to General Halleck, then General-in-Chief of the American Armies, and a writer of authority on international law, Professor Lieber said:

> Here is the *projet* of the code I was charged with drawing up. . . . I have earnestly endeavored to treat of these grave topics conscientiously and comprehensively; and you, well read in the literature on this branch of international law, know that nothing of the kind exists in any language. I had no guide, no groundwork, no text-book. . . . Usage, history, reason, and conscientiousness, a sincere love of truth, justice, and civilization, have been my guides; but of course the whole must be still very imperfect.[5]

The *projet* was submitted to a Board of Officers, who, in Lieber's opinion, added some valuable parts. In a letter dated May 20, 1863, likewise to General Halleck, he wrote: "As the order now stands, I think that No. 100 will do honor to our country. It will be adopted as a basis for similar works by the English, French, and Germans. It is a contribution by the United States to the stock of common civilization." [6]

Lieber was perhaps aware, although he did not claim it, that he had proved in the most difficult of fields, the possibility of codifying the law of nations, but it is doubtful if even he, with his sturdy self-respect, appreciated the extent to which his *projet* was a veritable masterpiece. It was natural that he should look forward to the time when the laws of peace, as well as those of war, should be stated in the form of a code. His friend, Professor Bluntschli, saw this even clearer than the author. He translated the Instructions into German, and his *Modern International Law of Civilized States, in the Form of a Code*[7] was properly dedicated to Lieber, as the work, as Bluntschli himself said, was due to Lieber's famous Instructions, General Orders No. 100.[8]

[5] The Life and Letters of Francis Lieber, edited by Thomas Sergeant Perry (1882), pp. 330–331.

[6] *Ibid.*, pp. 333–334.

This was also the opinion of Dr. Bluntschli, Professor of International Law in the University of Heidelberg: "The Instructions . . . formed the first codification of International Articles of War (*Kriegsvölkerrecht*). This was a deed of great moment in the history of international law and of civilization." "Lieber's Service to Political Science and International Law," by Dr. J. C. Bluntschli, Introduction to Volume II, The Miscellaneous Writings of Francis Lieber (1881), p. 12.

[7] *Das Moderne Völkerrecht der Civilisirten Staten als Rechtsbuch Dargestellt* (1878).

[8] "These instructions prepared by Lieber, prompted me to draw up, after his model, first, the laws of war, and then, in general, the law of nations, in the form of a code, or law book, which should express the present state of the legal consciousness of civilized peoples. Lieber, in his correspondence with me, had strongly urged that I should do this, and he lent me con-

Bluntschli was not long to have the field to himself. Before his code had appeared, David Dudley Field, whose name is inseparably connected with the codification of municipal law in the United States, had proposed, at the meeting of the British Association for the Promotion of Social Science, held at Manchester, in September, 1866, the appointment of a committee "to prepare and report to the Association the Outlines of an International Code, with the view of having a complete Code formed, after careful revision and amendment, and then presented to the attention of governments, in the hope of its receiving, at some time, their sanction." [9] The proposition was welcomed and the committee appointed, of which Field was naturally a member, and, as is the way of committees, the member who had it appointed was the only one who did the work. In 1872 Field's Outlines of an International Code appeared. It was now evident on both sides of the Atlantic that international law could be stated in the form of a code. The question was, how could international law best be stated? By one man, or several? By groups of persons acting under instructions from their respective governments, or by groups of persons selected without the intervention of governments, and acting without their instructions?

As Lieber was then the one man in the world who had had practical experience, not merely in the codification of a branch of international law, but in having it approved and published by a government as the law of the land, his views are of authority. He disapproved of Field's idea, and he proposed the plan which is gradually codifying the law of nations. In a letter to his friend, Judge Thayer, of Philadelphia, under date of May 7, 1869,[10] he said, "I am unqualifiedly averse to Field's idea of having a code of the law of nations drawn up, and then trying to make governments adopt it. They would not, and ought not to, adopt it." Why? According to Field's critic, "The strength, authority, and grandeur of the law of nations rests on, and consists in, the very fact that reason, justice, equity, speak through men 'greater than he who takes a city'—single men, plain Grotius; and that nations, and even Congresses of Vienna, cannot avoid hearing, acknowledging, and quoting them." [11]

Three years later, in a letter to General G. H. Dufour, of Geneva, under date of April 10, 1872,[12] he gave fuller effect to what he had called in the previous letter, "a favorite idea," saying that, "one of far the most effectual and beneficent things that . . . could be done for the promotion of the intercourse of nations in peace or war . . . would be the meeting of the most

tinual encouragement." "Lieber's Service to Political Science and International Law," by Dr. J. C. Bluntschli, Introduction to Volume II, The Miscellaneous Writings of Francis Lieber (1881), p. 13.

[9] David Dudley Field, Outlines of an International Code, Preface to the First Edition (Second Edition, 1876).

[10] The Life and Letters of Francis Lieber, edited by Thomas Sergeant Perry (1882), p. 391.

[11] *Ibid.*, p. 391.

[12] *Ibid.*, p. 422.

prominent jurists of the law of nations, . . . to settle among themselves certain great questions of the law of nations as yet unsettled. . . . I mean *settle* as Grotius *settled*—by the strength of the great argument of justice." And he expressed the opinion, justified, it would seem, by the experience of the world since the days of Grotius, that "A code or proclamation, as it were, of such a body, would soon acquire far greater authority than the book of the greatest single jurist." And he concluded this portion of his letter with the hope that, "such a meeting" might "be brought about in 1874." Lieber was essentially a practical man. He was, as he said, "born for action, and for action in troubled times."[13] And in addition to being a practical man, he was a practical prophet, which is even rarer. His jurists met, and formed themselves into a permanent body before the date he set. The Institute of International Law was founded at Ghent in 1873.

Lieber's views, as is the case with practical men, were the result of thought and reflection, in which the practical got the better of the ideal, without, however, displacing it. Thus, in a letter to his friend Bluntschli, written April 16, 1866,[14] he said:

> For a long time it was a favorite project of mine that four or five of the most distinguished jurists should hold a congress in order to decide on several important but still unsettled questions of national equity, and perhaps draw up a code. First I proposed that it should be an official congress, under the government, and corresponded with Senator Sumner on the subject. But after a while it became clear to me that it would be much better if a private congress were established, whose work would stand as an authority by its excellence, truthfulness, justice, and superiority in every respect.

In 1871, two years before the event, he had written a letter to Mr. Rolin-Jaequemyns, who was destined to found the Institute in accordance with Lieber's ideas, in which he brought together and stated in logical and consecutive form, the ideas which he had matured upon the subject.[15] "It has long been a favourite idea of mine," he wrote, "that some of the foremost international jurists should hold a Congress, *not official*, but boldly public and international, . . . a sort of juridical œcumenic council, without pope and without infallibility. . . . My Congress and its labours would be nothing more but one of the natural developments of our united progress on the broad road of our ciscaucasian culture." Lieber was conscious that his idea might cause merriment in some quarters, but he nevertheless held firmly to it. He admitted that his project would be "laughable if the idea were that governments would send the jurists," but he was firmly of the opinion that it would be "no more ridiculous" indeed, "for several jurists to treat unitedly on certain subjects" than it would be for "a single writer." Lieber was not unaware of the value of the idea which had become with him

[13] To Privy Councillor Mittermaier, May 16, 1854. Life, p. 275.
[14] *Ibid.*, p. 362.
[15] *Revue de Droit International et de Législation Comparée*, Tome V, 1873, p. 480.

well-nigh a hobby, if a practical man can be said to have a hobby. "I leave it to you how to mention this," he wrote, "either now *or when I am gone*, in a note or in the text; but whenever or howsoever you do it, I beg you to give it as a favourite idea of mine, held for many years. I cannot help thinking that you will at once not only agree with me, but rejoice at it."

Although codification was but one of the purposes for which the Institute was founded, it appears from a letter of M. Émile de Laveleye, written as a sort of preamble to the Constitution of the Institute, and to which its founders affixed their signatures, that it was uppermost in their minds. "Our principal purpose is to be able, by the free action of a limited group of eminent jurists, to state in as precise a manner as possible, the juridical opinion of the civilized world, and to give to this opinion an expression so clear and so exact as to have it accepted by the various States as a rule of conduct for their foreign relations. The Institute would thus prepare gradually this codification of international law, which is desired at this moment with such insistence, and which several of our members have attempted in works generally known and often invoked as possessing authority."[16]

Lieber had asked M. Rolin-Jaequemyns to mention his priority "either now *or when I am gone.*" M. Rolin-Jaequemyns, loyal in this as in every relation of life, did so, in an article which he contributed to the *Revue de Droit International et de Législation Comparée* in 1873, "*De la Nécessité d'organiser une Institution Scientifique Permanente pour favoriser l'Étude et les Progrès du Droit International,*"[17] after the formation of the Institute of International Law, in which he printed Lieber's letter in English, and accompanied it with a French translation in the footnote. It was, however, given to his friend, Bluntschli, to say what was then, as it is today, the final word on the subject:

> Lieber had great influence, I may add, in founding the *Institut de Droit International*, which was started in Ghent, in 1873, and forms a permanent alliance of leading international jurists from all civilized nations, for the purpose of working harmoniously together, and thus serving as an organ for the legal consciousness of the civilized world. Lieber was the first to propose and to encourage the idea of professional jurists of all nations thus coming together for consultation, and seeking to establish a common understanding. From this impulse proceeded Rolin-Jaequemyns' circular letter, drawn up in Ghent, calling together a number of men eminent for their learning. This latter proposal to found a *permanent academy for International Law* met with general acceptance, but this was merely a further development of the original idea of Lieber, which was at the bottom of the whole scheme.[18]

[16] Translated from *Annuaire de L'Institut de Droit International*, Première *année*, 1873–1875 (1877), p. 24.

[17] Tome V, p. 465.

[18] "Lieber's Service to Political Science and International Law," by Dr. J. C. Bluntschli, Introduction to Volume II, The Miscellaneous Writings of Francis Lieber (1881), p. 14.

There is a famous poem of Emerson which speaks of the architect who "builded better than he knew." Lieber was not such a one. He knew what he was doing, and he predicted the consequence. The Institute of International Law, from its first session, has had greater influence than any single modern writer on international law in the civilized world. Its resolutions dealing with different phases of international law and with the conflict of laws, have had more influence than all of the writers on international law or the conflict of laws since its foundation. Its resolutions on public international law enabled the two Hague Peace Conferences to draft and adopt conventions dealing with a variety of timely topics, which, through their ratification by the nations there represented, have become the law and practice of every civilized state. The conferences of private international law at The Hague and elsewhere are, in like manner, indebted to the resolutions of the Institute dealing with the conflict of laws. Unconsciously, through the Institute of International Law, codification has triumphed over the scoffers and doubters, and the prophecy, rather than the dream, of Lieber, has been fully realized. In moments of doubt and of difficulty, and of consequent hesitation, the Institute of International Law need only think of Lieber, and push ahead.

So much of codification in Europe, through the Institute of International Law and the Hague Conferences. Next of its codification in the Americas, which, reversing Lieber's process, began with the governments, only to end with the group of unofficial publicists.

In 1911, Mr. Alejandro Alvarez, the distinguished publicist of Chile, happened to be in Washington, and, as he and the present writer had already begun that friendship which was to continue throughout the years, they talked of the things which men of the same calling have in common. The subject then, and now, uppermost in their minds was codification. One of them had but recently returned from The Hague, where he had taken part in codification under the plans of the Institute of International Law; the other was about to proceed to the Commission of Jurists to meet in Rio de Janeiro in the summer of 1912. They wondered how the publicists of the different American Republics could be put behind codification, push it forward and force its acceptance upon the governments. They were of the opinion, justified by the event, that what an institute of international law had done in Europe, an American institute of international law might hope to do in the new world. The plans which they then formed and have since been able to carry into effect, are stated in a letter of June 3, 1911, addressed to Mr. Elihu Root, then a Senator of the United States, without whose support neither was willing to take the decisive step. In the course of this letter it is said:

> After reflection and much discussion we came to the conclusion that the best way to draw the leaders of thought together would be to create an institute of international law in which each country would have equal representation, say, five members; that the members of each country

> should organize at their capital a local society of international law; that the American Institute should hold at Washington the first of its periodic meetings to discuss scientific questions of international law, especially those relating to peace, so that little by little a code of international law might be drafted which should represent the enlightened thought of American publicists and be the result of their sympathetic collaboration.

In the succeeding passage of the letter, the purpose of the proposed Institute is stated in terms which are happily in accord with the facts of the present day:

> Our opinion is that a code of international law undertaken by delegates of the American Governments would necessarily conform to the express instructions or to the practice of their governments, and that the code thus drafted would be political rather than scientific; that a better code could be produced by the painstaking study of unofficial publicists, and that such a code produced under such circumstances would not merely be better in itself, but would stand a better chance of adoption in whole or in part by the governments, either expressly at some Pan American conference or silently and piecemeal in the practice of the various foreign offices. In any event, it has seemed to us that the nonofficial cooperation of an equal number of publicists selected from the Republics composing the Pan American Union would be of the greatest service in the codification of international law by official delegates meeting in conference.

"The date was not foreseen when this might happen. On the 2nd of January, 1924, the invitation of the Governing Board of the Pan American Union enabled the American Institute of International Law to realize its self-imposed mission." [19]

A resolution adopted by the Fifth Pan American Conference, meeting in Santiago de Chile in 1923, recommended that codification should be gradual and progressive, and proposed as a basis of discussion the projects presented to the conference by the delegate of Chile, Mr. Alejandro Alvarez, entitled the "Codification of American International Law." [20] In the report of Mr. Carlos Aldunate Solar introducing the resolution, it is said that the codification of international law is desirable, and that while "complete codification may not be practicable, there is nothing to prevent the gradual approximation to this end through conventions entered into between the countries of the Continent, embodying the principles upon which they are agreed." After stating that the object of complete or partial codification of international law had been demonstrated in the conference then in session, it was nevertheless true that codification "requires the cooperation of special-

[19] From the letter of the President of the American Institute of International Law, dated March 2, 1925, to the Honorable Charles Evans Hughes, Chairman of the Governing Board of the Pan American Union, transmitting the projects of conventions. Codification of International Law (1925), pp. 5, 11.

[20] Report of the Delegates of the United States of America to the Fifth International Conference of American States, held at Santiago, Chile, March 25 to May 3, 1923 (1924), p. 131.

ists, ample time and an environment of tranquility which is much more characteristic of scientific bodies than of conferences entrusted with the consideration of such varied topics as is the present conference." This is Lieber's doctrine, and a Secretary of State of that country whereof Francis Lieber was a naturalized citizen, was to carry the resolution and the doctrine into effect.

The American Institute seemed to Secretary Hughes to be a body composed of specialists with ample time at its disposal, and likely to conduct its labors in that "environment of tranquility which is much more characteristic of scientific bodies" than of political conferences. Therefore, he turned to the American Institute and asked it to prepare a series of projects of international law to be laid before the Commission of Jurists to be composed of not more than two delegates appointed by each of the American Republics. Secretary Hughes submitted the request to, and it was adopted by, the Governing Board of the Pan American Union, that the American Institute should meet in 1924, to the end that the results of its deliberations could be submitted to the International Commission of Jurists.

Inasmuch as the first session of the Institute had been held in Washington in connection with, and indeed under the auspices of, the Second Pan American Congress, it was felt that the session which the Pan American Union had requested could properly be held in Lima, in connection with the meeting of the Third Pan American Scientific Congress, which was to convene in that city on December 20, 1924. It was evident that the meeting would fail of results unless projects were drafted in the meantime and laid before the members at Lima. Therefore, Mr. Alejandro Alvarez (Chile), Mr. Luís Anderson (Costa Rica), and the writer of this article, met in Paris during the summer of the year and succeeded in putting into more or less acceptable shape some thirty projects. The projects which Mr. Alvarez had submitted to the Fifth Pan American Conference were to be presented to the International Commission of Jurists as a basis of discussion. The three members, who formed, as it were, a preparatory committee for the session of the Institute at Lima, took these projects as a starting point, revising them and adding others. Thirty projects were drafted by them dealing with the following subjects: (1) Preamble; (2) General declarations; (3) Pan American Union; (4) Fundamental bases of international law; (5) Declaration of the rights and duties of nations; (6) Fundamental rights of the American Republics; (7) International rights and duties of natural and artificial persons; (8) Nationality and naturalization; (9) Immigration; (10) Rights and duties of foreigners, and diplomatic protection; (11) Responsibility of governments; (12) Maritime communications in time of peace; (13) Maritime neutrality; (14) Freedom of transit; (15) Aerial navigation; (16) Treaties; (17) Recognition of new states and new governments; (18) Recognition of belligerency; (19) Diplomatic agents; (20) Consuls; (21) Extradition; (22) Rights and duties of nations in territories in dispute on the question of boundaries;

(23) Exchange of publications; (24) Interchange of professors and students; (25) Pacific settlement; (26) Measures of repression; (27) States; (28) Jurisdiction; (29) Acquisition and loss of territory; (30) National domain.

If they have a familiar look, this was the intention of the committee, inasmuch as the less novel they were in title, in form, and in substance, the greater, they thought would be their chance of acceptance. Indeed, the committee, as such, and the members in their individual capacities have always sought to avail themselves, in so far as possible, of preëxisting projects, not only to profit by past experience, but, to secure the acceptance of projects which, although drafted by themselves, nevertheless represent the thought and wisdom of many minds.

The members of the American Institute who attended the Third Pan American Scientific Congress at Lima discussed the projects day by day during its meeting.[21] Project No. 18, on the recognition of belligerency, was rejected on the ground that civil war should not be "encouraged" in the American Republics by conventions on the subject. No. 29, on the acquisition and loss of territory, was questioned, and it was eventually dropped. The others, twenty-eight in all, were approved with sundry modifications. Two additional projects were presented, the first of which, condemning acquisition by conquest, was unanimously adopted and became project No. 30 of the Pan American Union. The second, on the navigation of international rivers, was adopted after prolonged discussion, and appeared as project No. 19 of the Pan American Union. In their revised form, there were thus thirty projects in all.

The members of the American Institute at Lima appointed a committee of seven members [22] to subject the projects to a formal revision. It met in Habana, in February, 1925, and considered the thirty projects of Lima. No. 8, on nationality and naturalization, was rejected on the ground that one of the members considered it as more properly belonging to international private law. No. 29, on acquisition and loss of territory, was modified and given the name of "Conquests." No. 25, on pacific settlement, was cut in half, by separating from it the part dealing with the Pan American Court of Justice. There were thus thirty projects approved at Habana. In the four official languages of the Americas: Spanish, Portuguese, French and English, they were the ones which Secretary Hughes laid before the Governing Board of the Pan American Union on March 2, 1925.

Secretary Hughes read and pondered the projects, and when he presented

[21] For the proceedings of these meetings, *see* American Institute of International Law, Informal Conversations of Lima, December 20–31, 1924, published in the four official languages of the Americas, by the Carnegie Endowment for International Peace: (Washington, 1924).

[22] The committee was composed of the following members (in alphabetical order): Mr. Alejandro Alvarez (Chile), Mr. Luís Anderson (Costa Rica), Mr. Antonio Sanchez de Bustamante y Sirvén (Cuba), Mr. Pierre Hudicourt (Haiti), Mr. José Matos (Guatemala), Mr. Rodrigo Octavio (Brazil), and Mr. James Brown Scott (United States).

them to the meeting of the Governing Board of the Pan American Union, called for that express purpose on March 2, 1925, two days before he relinquished the Secretaryship of State, he spoke, not only in the fulness of knowledge, but with the vision of the prophet. Although his address on this occasion is fortunately well known, it is so material to the present purpose that his opening remarks and those with which it concluded should be given in his own language:

> It is a high privilege to present the subject of this special meeting to the Governing Board of the Pan American Union. It is a subject of transcendent importance as it relates to the establishment among the nations of the reign of law and to the endeavor of the American Republics to hasten the fulfillment of this purpose by a more definite formulation of the rules of international law. It was fitting that the American Republics, free as they happily are from many of the historic antagonisms and rival ambitions which have vexed the peace of other parts of the world, should take the lead in this effort, and through the painstaking studies of American jurists gratifying progress has been made.

After stating the origin of the projects, their nature and content, and the initiative of America in codification, Secretary Hughes said:

> At last we have texts and projects, the result of elaborate study, for consideration. We have the inspiration and stimulus of this action full of promise for the world. We feel that, thanks to American initiative, we are on the threshold of accomplishment in the most important endeavor of the human race to lift itself out of the savagery of strife into the domain of law breathing the spirit of amity and justice.

And, speaking as Secretary of State and as Chairman of the Governing Board, in the presence of the accredited representatives of the American Continent, he felt himself justified in adding:

> I believe that this day, with the submission of concrete proposals which take the question of the development of international law out of mere amiable aspiration, marks a definite step in the progress of civilization and the promotion of peace, and for that reason will long be remembered. For in this effort we are not unmindful of the larger aspects of the question, and it is our hope that the American Republics by taking advantage of this opportunity may make a lasting contribution to the development of universal international law.

On the same occasion, Secretary Hughes requested, as previously stated, the American Institute of International Law, to take up the subject of private international law, with the understanding that its projects, as in the case of public international law, would be laid before the International Commission of Jurists. The probability of such an invitation was foreseen, and at the Lima session, in addition to a committee to revise the projects of public international law, a committee of four was appointed to prepare the projects of the Institute on the conflict of laws. This committee consisted of Mr.

Antonio S. de Bustamante (Cuba), Mr. José Matos (Guatemala), Mr. Rodrigo Octavio (Brazil), and the late Mr. Eduardo Sarmiento Laspiur (Argentina).

Mr. Bustamante accepted the chairmanship of the committee, and, as Francis Lieber had prepared a code on the laws of land warfare, to be submitted to a committee, so Mr. Bustamante drafted a complete code of private international law to be submitted to the committee of which he was chairman. The committee met in Habana, in December, 1925, where the code was slightly revised. It was thereupon submitted to the Honorable Frank B. Kellogg, Secretary of State of the United States and Chairman of the Governing Board of the Pan American Union. He laid the code before the Governing Board February 3, 1926, on which occasion, he said in part:

> It is a happy circumstance that when the International Commission of Jurists meets at Rio de Janeiro the members will find prepared for them the valuable drafts prepared by the American Institute of International Law. In spite of any differences of opinion that may develop relative to basic principles or to details, the preparation of these drafts of conventions marks an important step forward in international relations. Community of standards in public and private international law represents an important factor in the development of closer international relations. The Governing Board therefore owes a very real debt of gratitude to the American Institute of International Law for the important service which they have rendered and I am certain that I am formulating what is in your mind when I give expression to this sense of obligation.
>
> . . . I realize that when it comes to a draft of private international law it may contain questions of principle on which the countries may very seriously differ and raise questions which will have to be very carefully considered by any conference for the revision of international law. However, the draft herewith submitted furnishes a basis for discussion.

It therefore happened that the thirty projects of public international law, and the code of private international law prepared by the American Institute of International Law at the request of the twenty-one American Republics, were transmitted to the different governments in advance of the meeting, to the delegates to the International Commission of Jurists, and were on the table before them when they began their deliberations.

Each of the Institutes has justified its existence. Each owes its origin directly or indirectly to Francis Lieber. Each has fulfilled Lieber's prophecies, and each is, curiously enough, the beneficiary of his vision. In a letter of December 15, 1866, to Andrew D. White, Lieber had written:

> I fancy sometimes—but only fancy—how fine a thing it would be for one of the Peabodies, or some such gold vessel, to give, say twenty-five thousand dollars gold, for the holding of a private—*i.e.*, not diplomatic, although international—congress of some eight or ten jurists, to concentrate international authority and combined weight on certain great points, on which we have now only individual authorities.[23]

[23] Life and Letters, p. 367.

It was reserved to Mr. Andrew Carnegie, through his Endowment for International Peace, of which Mr. Andrew D. White was one of the original trustees, to be the "gold vessel," contributing twenty thousand, instead of twenty-five thousand dollars, to each meeting of the Institute of International Law, and a somewhat lesser sum to each of the meetings of the American Institute of International Law.

In view of the intimate relations between the labors of the American Institute of International Law and of the International Commission of Jurists, it seems not inappropriate to mention, although in passing, the earlier activities of the American Institute.

On January 6, 1916, during its first session, in the City of Washington, it adopted a "Declaration of the Rights and Duties of Nations," of which Mr. Hughes, speaking as Secretary of State, said, in his official capacity, in Philadelphia, on the occasion of the celebration of the centenary of the Monroe Doctrine, November 30, 1923:

> It can not be doubted that this declaration embodies the fundamental principles of the policy of the United States in relation to the Republics of Latin America. When we recognized these Republics as members of the family of nations we recognized their rights and obligations as repeatedly defined by our statesmen and jurists and by our highest court. We have not sought by opposing the intervention of non-American Powers to establish a protectorate or overlordship of our own with respect to these Republics. Such a pretension not only is not found in the Monroe Doctrine but would be in opposition to our fundamental affirmative policy.

To the Vicomte Poullet, lately Prime Minister of Belgium, the Declaration has had an influence beyond the American Continent. In the introduction to his *Manuel de Droit International privé belge* (1925), he says: "This Institute held its first session in Washington, . . . at which it voted the Declaration of the Rights and Duties of Nations, which seems to have influenced notably President Wilson's conditions of peace."

At the second session of the American Institute (January 22–27, 1917), among the many projects considered, one on international organization called "The Recommendations of Habana" was adopted, which to Mr. Jayme Darcy seems destined to have continental influence, inasmuch as he said, in a formal address delivered in Rio de Janeiro, May 17, 1927, speaking in behalf of the Brazilian Society of International Law, that: "Their ten articles constitute a veritable international organization between the nations of America."

The third session of the American Institute was postponed because of the World War, a fate which happened not only to private and scientific organizations, but to the Fifth of the American Conferences. At the instance of the Pan American Union, however, it was held in Lima, December 20–31, 1924, and devoted itself to the consideration of the projects of public inter-

national law, making arrangements, as already stated, for projects on the conflict of laws.

The fourth session of the American Institute took place in Montevideo, March 21–26, 1927, on the eve of the meeting of the Commission of Jurists, and, because of the proximity of the two meetings, and the presence of members who were also delegates to the Commission at Rio de Janeiro, it seems desirable to say something of the session of the Institute at Montevideo as an introduction to the proceedings of the Commission.

The meeting was held in Montevideo because of a long-standing invitation from the Government of Uruguay. Its program included a revision of the constitution and by-laws of the Institute, in order to enlarge its scope so as to include the conflict of laws, as well as public international law; a review of the projects on public international law which, adopted by the Institute at Lima, had been sent out by the Pan American Union to the Governments of the American Republics; consideration of the code of private international law prepared by Dr. Bustamante, approved by the committee of which he was chairman, and likewise transmitted to the Governments of the American Republics; an examination of the project on private international law to be presented by the Uruguayan Society of International Law, and proposals of new projects of codification.

The constitution and by-laws were revised, and the Executive Council enlarged to eleven members—three *ex officio*, the President, Secretary-General, and Treasurer, and eight elected members, chosen in such a way as to represent the following countries, from south to north: Chile (Mr. Alejandro Alvarez), Argentina (Mr. Carlos Saavedra Lamas), Uruguay (Baltasar Brum), Brazil (Rodrigo Octavio), Bolivia (Alberto Gutierrez), Peru (Victor M. Maurtua), Colombia (Antonio José Uribe), Costa Rica (Luís Anderson), Mexico (Genaro Fernández MacGregor), Cuba (Antonio S. de Bustamante), the United States (James Brown Scott). This committee was to represent in law and in fact the Institute in the interval between its meetings. It is to be hoped that it will meet at least every two years, in accordance with a resolution stating that the "scientific contribution of the Institute to the development and regulation of international law in America requires a constant labor of investigation, and as frequent meetings of the Executive Council as is possible."

The thirty projects of public international law drafted by the American Institute, as well as those of members from Argentina, Uruguay, Bolivia and Peru, presented at Montevideo, were to be considered "as a scientific contribution of the Institute to the preparation of American international law legislation," to be undertaken by the Pan American Conferences. All of these projects received the approval of the Institute, "in so far as they tend to make international solidarity more intense and more susceptible of rules, and to unite more closely the American Republics in the advancement and perfection of the organization of their continental relations." This action

on the part of the Institute was intended to be, and was in fact, an approval of the projects of public international law.

The Institute adopted a series of resolutions to which the collective name was given: "Rules of Montevideo for the formation and development of Positive International Law in America." As these rules state the measured judgment of the American Institute on the codification and development of international law, they are given in full:

> A. In order to give precision to the ideas concerning the labors under way in Europe and America in preparation of international legislation, it is well to replace the incorrect term "codification" commonly applied to it with "formulation and development of positive international law in America."
>
> B. These labors should consist in partial systematizations of international legislation or of existing customs and in their gradual and progressive extension in harmony with the development and perfecting of international science and so far as permitted by the legal consciousness of the American continent.
>
> C. The work of systematizing and developing international law in America imperatively needs to be methodized by the creation of technical organs permanently devoted to that object.
>
> D. The method of the preparation for the labors of formulation and development of positive international law in America should rest upon the basis of the selection of subjects considered opportune at a given moment for a general concert of the governments.
>
> E. The most adequate form of international regulation is that of partial collections of the law in force and of projects for collective conventions upon the matters wherein it is necessary to further legislative development.
>
> F. The selected matters suitable for legislation in America should, in advance of any deliberation by official delegates, be the object of investigation and scientific "reports" on the part of bodies on the Continent devoted to the study of international law.
>
> G. It is strongly recommended that the next meeting of the legal delegates of the governments advance the regulation and development of international law in America by the adoption of a series of subjects and formulas on the studies and projects already prepared, and by the creation of the organs and the sanction of the most adequate methods for rendering permanent and efficacious that important and transcendental inter-American work.

The Institute did not undertake the consideration of the project of the code of private international law, which was based both upon the doctrine of nationality and domicile. The Uruguayan members are out and out partisans of the theory of domicile and territoriality, advocating the acceptance of the conventions of private international law adopted at Montevideo in 1889, which frankly accepted domicile in preference to nationality. There was a difference of opinion among the other members, and a committee was appointed to consider what should be done. This committee presented a report, adopted by the Institute, of which the material portion follows:

> The status and capacity of physical persons domiciled in the territory

> of a state and in general all the legal relations of a personal character of the same, shall be governed by the system of private international law adopted by the legislation of said State.
>
> The commission is in agreement in considering that this formula does not modify the present situation since each country continues to apply fully to domiciled foreigners, as regards personal relations, either the law of their domicile or their national law according to the principle sanctioned in the respective legislation. But the indicated text offers the advantage of permitting a continuance of the attempt to codify private international law in the part referring to civil law.

Mr. Bustamante, although he did not attend the meetings of the Institute at Montevideo, was apparently thinking of the subject, and came to an analogous conclusion, for the revised Article 7, which is the fundamental principle of his code, as presented by him at Rio de Janeiro, is, in effect, if not wholly in form, that which had been adopted by the American Institute at Montevideo in his absence, and therefore, without his knowledge. The agreement of the members at Montevideo made the acceptance of Mr. Bustamante's revised article certain. This greatly facilitated the discussion of the code, and played no small part in its eventual adoption by the Commission at Rio de Janeiro.

It would be unfair to consider the meeting of the American Institute at Montevideo as a preliminary meeting to the Commission of Jurists at Rio de Janeiro, but it would be fair to say, as it would only be the fact, that if it was not a preliminary session, it was, nevertheless, a session which assured the success of the subsequent meeting of the American Commission of Jurists at Rio de Janeiro within less than a month.

The friendships of Montevideo resulted in the conventions of Rio de Janeiro.

The International Commission of Jurists was intended to be composed of two members appointed by each of the American Republics who should meet in the course of 1925, at a date to be fixed by the Pan American Union, in conference with the Government of Brazil, in order to consider the codification of international law, public and private. To aid the members, the Pan American Union had requested the American Institute of International Law to consider both these branches, and the results of the labors of the Institute as already set forth, were presented in advance of the meeting of the Commission, to the Governments of the American Republics, and transmitted by the Pan American Union to the Government of Brazil, in order to be laid before the Commission when it should meet. It was the hope that each government would appoint two delegates, one of whom should attend the meetings of the Subcommission of Public International Law, and the other, that of the Conflict of Laws. This was not to be. Of the twenty-one American Republics, seventeen appointed delegates; nine of them two delegates each (Argentina, Bolivia, Brazil, Colombia, Cuba, Mexico, United States, Uruguay, and Venezuela); and eight of them, but a single delegate

each (Chile, Costa Rica, Ecuador, Haiti, Panama, Paraguay, Peru, and Santo Domingo). This failure on the part of the American Republics to appoint two delegates each was a double misfortune. It made it necessary for the single delegate to attend each of these two subcommissions, thus doubling the work, and causing the subcommissions to meet at different times and places, thus reducing by one-half the meetings which each subcommission could have held during the session.

Notwithstanding these draw-backs, the Commission meeting informally on April 16th, and formally on the 18th, and adjourning May 20th, has to its credit twelve projects of public international law, and a code of private international law of no less than 439 articles. One wonders what it would have done if it had sat some four months, as did the Second Hague Peace Conference of 1907, or what it might have accomplished if the subcommissions had been able to meet simultaneously on the mornings and afternoons of each working day. As it was, the International Commission of Jurists, in a session of five weeks, furnishes the first successful example of a body of official delegates, meeting for the conscious, indeed, express purpose of codifying public and private international law, and adjourning with more projects, it is believed, of one and the other to its credit, than any official body sitting for the same length of time. Indeed, it is not too much to say that its labors in the domain of private international law exceed in quantity and in value that of all other official gatherings ever held for the purpose, and that its adoption of twelve projects of public international law demonstrated the possibility of codification of the law of nations by official delegates, if only preparation has been made in advance by competent bodies composed of unofficial, and therefore non-political representatives. This demonstration would, in itself, have justified the meeting of the Commission, and it is not too much to say, for it is simply a fact, that the American Jurists meeting in Rio de Janeiro saved the cause of codification from its avowed opponents or lukewarm advocates. Because of the work of the Commission we are entering upon an era of law which is certain, in the course of time, to get the better of force.

Mr. Epitacio Pessôa, delegate from Brazil, was elected President of the Commission over which he presided with dignity, authority and success. He is a Judge of the present Permanent Court of International Justice, and was recently President of Brazil. Mr. Pessôa had presided over the first international commission of jurists, meeting in Rio de Janeiro in 1912. It opened with a code of public international law before it prepared by Mr. Pessôa, and a code of private international law prepared by his distinguished colleague, Mr. Lafayette Rodriguez Pereira. These codes had not been sent to the governments in advance of the meeting. The delegates met without knowledge of their contents, but they were averse to the codification of either subject, preferring a gradual and progressive statement of the law. Mr. Pessôa was invited by his colleagues of 1927 to preside over the Subcom-

mission of Public International Law, and Mr. Rodrigo Octavio was elected to preside over the section on Private International Law.

The Fifth Pan American Conference meeting in Santiago de Chile in 1923, had recommended the Commission to take as a basis the projects presented by Mr. Alvarez to the Conference. As these projects had been incorporated in a modified form in the projects of the American Institute of International Law, which had been transmitted by the Pan American Union to serve as a basis of its labors, there might seem to have been no reason why Mr. Alvarez' projects should have been specifically laid before the Commission. The delegates of the United States, Mr. Jesse S. Reeves, and the present writer, insisted, even over Mr. Alvarez' protest, that the original texts of his projects should be considered by the Commission as before it, inasmuch as his original projects had been modified, and to the extent of the modification, a captious critic might suggest that the recommendation of the Pan American Conference meeting at Santiago had not been strictly complied with. At the same time, the delegates of the United States insisted that Mr. Pessôa's code of public international law of 1912 should likewise be laid before the Commission, although Mr. Pessôa himself stated his acceptance of the projects of the Pan American Union, and his unwillingness to have his code considered.

The views of the delegates of the United States prevailed in both instances, so that the Commission found itself in possession of ample materials: twenty-seven projects of public international law of the Pan American Union. Those on "The Pan American Union" and "Aerial navigation" had been withdrawn from the consideration of the Jurists by resolution of the Pan American Union, in view of the fact that these two subjects were being considered elsewhere; and at the request of Mr. Bustamante, the project on extradition was transferred to the Subcommission on Private International Law, inasmuch as he, and no doubt many of his colleagues, excluding the delegates of the United States, were of the opinion that extradition was a topic of private, rather than of public international law. In addition, the Commission had before it the original texts of Mr. Alvarez' proposals, and of Mr. Pessôa's code of public international law.

At the first meeting of the subcommission of International Public Law, on April 19th, an exchange of views was had as to the procedure to be followed. The delegates of the United States felt that it would facilitate the work if a committee of five members should be appointed by the President, of which he himself should be *ex officio* a member, in order to consider these matters. This was done, with the result that this small body met almost daily during the session of the Commission. Mr. Pessôa feared that the Commission would not have time to consider all of the projects, inasmuch as he was obliged to leave Rio de Janeiro on May 24th, in order to arrive at The Hague on June 15th, to attend the session of the Permanent Court of International Justice. The committee agreed that within the given time

it would be difficult to consider adequately the twenty-seven projects. Mr. Pessôa suggested that some of them were political in nature, and that without prejudicing them in any way, the Commission of Jurists should lay them aside, in order to consider those projects which were exclusively juridical. On this account and for other and different reasons, the following projects were laid aside: Preamble (No. 1), General declarations (No. 2), Declaration of Pan American unity and coöperation (No. 3), Declaration of rights and duties of nations (No. 7), Fundamental rights of American Republics (No. 8), National domain (No. 10), Rights and duties of nations in territories in dispute on the question of boundaries (No. 11), Jurisdiction (No. 12), Responsibility of governments (No. 15), Diplomatic protection (No. 16), Freedom of transit (No. 18), Navigation of international rivers (No. 19), Pan American court of justice (No. 28), Measures of repression (No. 29), and Conquests (No. 30). Fifteen projects were thus excluded. Provisions of the remaining twelve are to be found in ten of the projects adopted. Extradition appears in the code of private international law; so that thirteen of the 27 projects transmitted by the Pan American Union were appropriated in whole or in part by the Commission. Two projects not contained among those transmitted were adopted: "Asylum" and "Duties of states in case of civil war."

The method of procedure was for the committee to present projects to the subcommission. Mr. Pessôa acted as draftsman of the committee, and prepared in Portuguese, the projects to be submitted for the consideration of the members. As modified by discussion, the projects were thereupon submitted to the subcommission where they were further discussed and further modified, if, in the opinion of the members, changes seemed desirable. And it is to be said that in plenary session of the Commission, the first two projects, on "The fundamental bases of international law" and "States" were discussed and seriously modified in what had been supposed was to be their final form. The others were, for the most part, with the exception of "Asylum" and "Duties of states in case of civil war," the projects of the Pan American Union, with modifications here and there which were either improvements or, at any rate, did not render them unacceptable.

The first project, on "The bases of international law" was one which Mr. Alvarez had submitted to the Fifth Pan American Conference. It was modified by the American Institute, very much modified by the committee, further modified in the subcommission, and finally changed in the plenary session. Its twenty-two articles were reduced to eleven; its language is much changed—in one or two cases improved, but the final text is not so good in other respects as that of the Pan American Union. It may seem to some that its provisions were better fitted as an introduction to a treatise on international law than as a project of a code. The better opinion would seem to be that it properly finds a place among the projects, and that it is an acceptable statement of the fundamental bases of international law to

which the American Republics should give their express and conventional adherence.

The second project, on "States" is, it is believed, acceptable in its present form, although there were not a few members of the Commission who would have preferred the articles of the various conventions of those projects of the Pan American Union, from which its provisions were taken, to have been preserved in their original form, or at least without serious modification.

The project on "States—Their existence, equality, recognition," contains but nine articles. If, however, it were adopted in practice, as it can not be rejected in theory, it would make a newer and a happier world. After enumerating the elements which constitute a state, the project says, without circumlocution or equivocation, that "States are legally equal"; that being such, they are independent and, therefore, "no state has a right to interfere in the internal affairs of another"; and that as it is the people within certain territorial boundaries who make the state and give it the form of government which they prefer, it follows that it is they who should decide when the state exists. Its recognition by other states depends upon them, inasmuch as they, too, are independent. But when a state exists, and its existence has been recognized, the mere change of a government by revolution, force, or other means, should be recognized by other states, provided that it is organized in such a way as to suggest its continuance, that it possesses, in fact, the sovereign power of the state, and that it is not only in a position to exercise its rights, but also to perform its international duties.

There is a passage in the project which should not need to be included; yet, as Talleyrand, that Prince of Diplomatists, said, "that is a reason for stating it." It is the old statement of Vattel, and of anyone who has given thought to the matter, whose mind is not clouded by prejudice and his eyes dazzled by the greatness of his own country: that the rights of a state do not depend upon its "bigness" or its "littleness." Vattel was of the opinion that a "dwarf" had the same rights as a "giant." When large states were small, they insisted upon equality as a fundamental of law and of policy. The Continental Congress instructed Dr. Franklin that the treaty which it hoped would be concluded with France, through which the independence of the thirteen states was obtained and recognized, should be on the basis of strict equality. This was as it should be. When nations become big—big territorially, big financially, big in every way—it is hard for them to keep their hands off a struggling, little country. They want to improve it; to help it on its journey onward and upward, whereas they, themselves, wanted to be let alone when they were little.

Why should high-minded persons differ about this? It is because there is a confusion in their minds between right and power; yet the two are poles apart. A person may not have a legal right to do a thing (and of course, we are speaking of a legal, not an illegal "right") and yet have the power to do it; on the other hand, he may have the legal right, and lack the power.

Some there are, perhaps, who would deny the right in the latter case, on the ground that a right which can not be enforced is abstract, and that we should deal with the realities of life, such as power. The matter is simple. The right may exist without power, and power, we know, has from the beginning of time existed without right. Power is a composite of various elements of a material kind: population, extent of territory, wealth, industry, commerce. We thus find ourselves in the face of two conceptions: right, and influence. It is hard for the man of large interests and social standing to admit that the beggar whom he passes in the street has the same legal rights as he; yet, he has. And that simple fact settles the matter, for states are made up of human beings.

Dr. Franklin records that the France of his day took a pleasure in considering itself the protector of the weak and the oppressed. We, of our day, and in our part of the world are pleased to think how successfully we have withstood the temptations of power. Of course, nations may conclude treaties, one with another, by which they may allow intervention under certain conditions. In this case, and to the extent granted, intervention becomes a legal right. But history would seem to show that the grant in such cases is rarely voluntary, and that its exercise is usually dangerous or questionable. The right may be acquired under Article 17 of the project on treaties providing that "two or more states may agree that their relations may be governed by rules differing from those expressed in conventions concluded by them with other states."

The project of "States" is made up of a provision here and there from the projects of the Pan American Union: Nations (No. 5), Recognition of new nations and new governments (No. 6), Declaration of rights and duties of nations (No. 7), selected by Mr. Pessôa and given the form which the subject either had in his code, or which he himself preferred.

The third of the projects deals with aliens—the basic principles of which are that aliens residing within a country should be entitled to civil as distinct from the political rights enjoyed by the citizens of that country; that they may be refused entrance, or, if allowed to enter, that they may be expelled "for reasons of public order or safety." This project is based upon No. 14 of the Pan American Union, which contained a sole article. The present project is very much enlarged and seems to be wholly acceptable. Indeed, it is admirable.

The same may be said of the project on "Treaties," based upon No. 21 of the Pan American projects, and Mr. Pessôa's code of 1912. The final product seems to be better than either of its sources, as it represents enlightened theory and present practice, and, in one respect, goes beyond both. As originally adopted, its 15th Article stated that "If one of the states [parties to a treaty] fail wholly, or in any essential part, to fulfil the obligation which each has contracted, the other can exact the fulfilment or consider the treaty as abrogated." Objection was made that the article in its present form might

be considered by the lay public as applicable to present difficulties. In the end, it was revised to read, "the obligations created by treaty shall be enforced in case of their non-fulfilment by the decision of a court of international justice or of an arbitral tribunal when diplomatic negotiations have been unsuccessful." This is the theory of the Second Hague Peace Conference of 1907, declaring that the interpretation or application of treaties and conventions could be submitted, without reservations, to arbitration. It was, however, only an expression of opinion, although unanimous, of the Hague Conference; it was not a project. The present article is an article of a project, which, if adopted, would bring practice into harmony with theory.

There are two articles of special interest. The first, No. 6, provides that ratification should be unconditional; that a reservation made by one of the ratifying states to a treaty binds the other state only when it has been informed of the reservation and consents to it. This provision applies to two contracting states. However, if the treaty is what is called multilateral, that is, if there are more than two contracting parties, a general rule has grown up through recent practice. It is thus stated by the Commission: "a reservation made by one of them in the act of ratification will only affect the respective clause and the state to which it refers." This provision was necessary in order to preserve conventions, such as those of the Hague Conferences, from nullification by applying the rule applicable to bilateral treaties. The other article referred to is the 7th, providing that states may refuse ratification, and the refusal is not to be considered an unfriendly act.

The fifth and sixth projects deal with what may be called American questions, inasmuch as the beneficiaries are exclusively American. The fifth obligates the American Republics to exchange copies of their official publications, not merely those issued by the governments, but also those to whose publications they have granted subsidies. They further oblige themselves to make their exchanges as complete as possible. The project is one of long-standing. On January 27, 1902, a convention to that effect was adopted at the Second Pan American Conference which met from October 22, 1901, to January 22, 1902, in the City of Mexico, and it is interesting to note that it was ratified by the Government of the United States.[24] The present project, with a verbal modification here and there, is No. 24 of the projects of the Pan American Union. It is, itself, the Convention of 1902, with unessential modifications. The chances are therefore in favor of its adoption, although perhaps in modified form, by the Sixth Pan American Conference which is to meet at Habana.

The sixth project provides for the interchange of professors and students. This, again, is a project with a history. Its unwearied advocate year in and year out is Dr. Leo S. Rowe, the present enlightened Director General of

[24] Second International Conference of American States, Senate Document No. 330, 57th Cong., 1st Sess., p. 213.

the Pan American Union. The resolution concerning this interchange was adopted at the Fourth Pan American Conference, at Buenos Aires, on August 18, 1910.[25] As in the case of the exchange of publications, the project is, with a possible change here and there, No. 25 of the Projects of the Pan American Union, which is practically the resolution of the Fourth International Conference of the American States, with immaterial modifications.[26]

On these two projects comment is permissible, and not wholly unnecessary. In the United States it is a matter of great difficulty to procure the session laws of the various States of the Union, and official publications of the different States. The difficulty of obtaining the publications of the Latin American countries is much greater, and yet, without them, it is sometimes impossible for one of the American Republics to procure adequate information of the others. This project is intended to place the official publications of each American Republic at the disposition of all, and to open them to the readers of the respective countries who may wish to consult them.

Many of us are so made that we only learn through our eyes, and to them travel opens up the physical world. Others learn through their ears, and to them, intercourse is a means to knowledge. It is best to visit a country in order to know it, but this seems impossible on a large scale. Therefore, we are trying to get the mountain and Mohammed together, by bringing professors of the Latin American universities to the United States; by sending professors of the United States to Latin America; and by an exchange of students to the various countries upon a plane of strict equality. Personal contacts are created, large and varied knowledge is acquired, and almost insensibly we learn how like us others are. The veil of ignorance is lifted.

The interchange of professors and students will be difficult, but the difficulty of the problem is a reason for undertaking its solution.

The rights and duties of diplomatic agents, and their diplomatic immunities, form the subject of the seventh project. It is long, consisting of thirty-two articles. It is detailed. It is admirable. It is the result of discussion in the committee under Mr. Pessôa's presidency, and of careful revision in the subcommission in which the American Republics were represented. An analysis of the project would be a summary of the practice of nations in such

[25] Fourth International Conference of American States, Senate Document No. 744, 61st Cong., 3rd Sess., p. 226.

[26] Francis Lieber apparently had not considered the interchange of students, although he had discovered the traveling professor. Perhaps he had in mind both, inasmuch as the professor was, in his conception, only a student of maturer years. However this may be, this is what he said in a letter under date of May 26, 1872, to the distinguished German publicist, Franz von Holtzendorff:

"In 1846, in one of my writings, I recalled the fact that under Adrian, professors were appointed to lecture in different places, and Polemon of Laodicea instructed in oratory at Rome, Laodicea, Smyrna, and Alexandria. The traveling professor had a free passage on the emperor's ships, or on the vessels laden with grain. In our days of steamboats and railroads the traveling professor should be reinstated. Why could not the same person teach in New York and in Strasburg?" (Life and Letters, p. 424.)

matters. It is unnecessary, as the present purpose is to state that the project is acceptable to the American Republics because based upon their practice. It is also acceptable to the world at large, because the practice is largely universal. There are, however, three matters which may be mentioned. The project does not classify diplomatic agents into ambassadors, ministers, etc. The members of the Commission were unanimously of the opinion that the Presidents of the various American Republics should not, as monarchs of Europe, have personal representatives; that the diplomatic agent should represent the state, thus having but one class, to the exclusion of ambassadors, who, in Europe represent the sovereign and, by an unacceptable imitation, represent the Presidents in the western world. It was with difficulty that the Commission was prevented from limiting the classes to ministers and *chargés d'affaires*, thus expressly excluding ambassadors. It finally contented itself with a unanimous recommendation to the Sixth Pan American Conference, which is to meet at Habana, that ambassadors should be dropped and diplomatic agents consist of two classes.

The second observation is that the Commission rejected consciously and, one might almost say, with malice aforethought, the use of the expression "extraterritoriality," in the project concerning diplomatic agents. The diplomatic agent of the American Republic accredited to Washington is in Washington, and by no possible fiction can it be successfully maintained that he is physically in Washington, but legally in the capital of his own country. However, it is correct to say that the diplomatic agents of the American Republics accredited to Washington are entitled to certain immunities from local law, civil as well as criminal, in order to enable them to perform without restraint their official duties, and that the agents necessary for the performance of these duties likewise enjoy immunity. This principle, the project adopts throughout.

There is a third observation which certainly will not be displeasing to the North American. It is the third numbered paragraph of Article 24, exempting diplomatic agents from customs duties "on objects intended for their personal use, or that of their families, to the extent fixed by the government of the state to which they are accredited." The connection between this provision and the Eighteenth Amendment to the Constitution of the United States is obvious. In its broad outlines, this is No. 22 of the Pan American project, somewhat modified in the draft presented by Mr. Pessôa to the committee, and very carefully discussed and considerably modified, and, indeed, improved in the subcommission. The original project is based upon the resolutions of the Institute of International Law, with changes here and there to fit some of its dispositions to American practice. As it left the Commission, it is believed to be better than any of its predecessors.

The same thing may be said of Project No. 8, on consuls. It is likewise a project (No. 23) of the Pan American Union, with modifications in committee and in subcommission. It has the same distinguished ancestry, and it

represents American practice. Consuls are admitted to possess requisite immunity both in their persons and official residences in order to enable them to perform their official duties. Their archives, of course, and their official documents, enjoy immunity; but in their private transactions they are properly subject to the law of the land. It would naturally follow that consuls can make no claim to consular asylum. Article 22 is in point: "A consul is obliged to surrender, on the simple requisition of the local authorities, all persons suspected of or condemned for crime, who may have taken refuge in the consulate."

There is an article of special interest to the United States, as it solves, in accordance with the Constitution of the United States, a question which has sometimes arisen because of the most favored nation treatment clause in consular conventions to which the United States are parties. The article is No. 17. The first of its three sentences states the general practice in the absence of constitutional provisions: "Consuls are not obliged to appear as witnesses before the courts of the state where they exercise functions." They must, "in conformity with local legislation, give their testimony in the building of the consulate or send it in writing to the authority designated for that purpose." The second sentence takes care of the constitutional clause: "They shall nevertheless give it personally in a trial in criminal prosecutions when the accused are entitled to present them as witnesses for the defense." The third sentence, forming the second paragraph, enables the government, through diplomatic channels, to have the consul in court, should he otherwise refuse to attend.

In the Consular Convention between France and the United States of February 23, 1853, it is stated that consuls were never to be "compelled to appear as witnesses before the courts" and that, should they be invited to appear and decline to do so, their testimony was to be "requested in writing," or "taken orally at their dwellings." (Article II.) In 1854, one Dillon, a French consul, was summoned to appear in court and give testimony. He pleaded the immunity under Article II of the treaty of February 23, 1853 with the United States. The decision of the court *In re Dillon*, 7 Sawyer, 561 (1854), was in favor of the consul. The question was argued by Secretary of State Marcy, who insisted that a treaty inconsistent with the Constitution of the United States was in itself unconstitutional, and that in the present case, the sixth amendment to the Constitution, providing that in all criminal prosecutions the accused should enjoy the right "to be confronted with the witnesses against him," and "to have compulsory process for obtaining witnesses in his favor," should prevail. France, on the contrary, stood upon the terms of the treaty. At length, Project 8 on consuls, decides in favor of the United States.

As was said of diplomatic agents, the consular project appears to be a decided improvement on any and all of its predecessors.

To the consideration of the ninth project, on maritime neutrality, there

was opposition, and finally, with misgivings on the part of some, it was removed from the projects which had already been laid aside. It was said to be out of place in a series of projects dealing only with the law of peace. The delegates of the United States, however, insisted upon its consideration, on the ground that the American Republics were like to be affected by any great war which might break out in other parts of the world, as the recent World War had unfortunately shown. They felt that in case of such a calamity, the rights of the American Republics, as neutrals, should exist in clear and unmistakable terms, before the war should arise; and that with a common law they could present a common front to law-breaking belligerents. Their view prevailed. It was necessary, however, that they should insist that the project as drafted was, in form and effect, the thirteenth convention of the Second Hague Peace Conference of 1907, on The Rights and Duties of Neutral Powers in Naval War. The project on maritime neutrality was among those which Mr. Alvarez had presented to the Fifth Pan American Conference, held at Santiago de Chile, in 1923. The committee in Paris had, however, eliminated from it most of the additions not to be found in the Hague Convention. These additions had been added to the original convention in the form of *voeux;* but they were not considered by the American Institute of International Law, nor were they considered in the Commission. The project, therefore, was practically that of the Hague convention, with sundry modifications suggested by experience had in the World War. With a change of position of some of the articles, the articles on visits and search added by Mr. Pessôa, the project was practically that of the Pan American Union.

The tenth project deals with asylum. It was an original proposition with the Commission of Jurists. It was apparently the general desire of the Latin American representatives that embassies and legations within their respective countries should be permitted to offer asylum, and that the practice should be regularized by a convention. The delegates of the United States were not parties to the project, as the practice of their country forbids it. However, they did not oppose its consideration, inasmuch as they recognized the right of their colleagues to draft such a convention, if they should care to do so, and submit it to the consideration of the Sixth Pan American Conference. The delegates of the United States therefore entered a general reserve. There are, however, two articles which could have been accepted:

> States are forbidden to give asylum in any place under their jurisdiction to persons suspected of, or condemned for a common crime, or who are deserters from the land and naval forces. [Article I.]
>
> A person accused of common crimes and who has taken asylum in a legation, on board a man-of-war, or military airship, must be given up if this be demanded by the local government. If asylum be given within the territory, delivery will be effected by extradition, in the terms stipulated in the convention of private international law. [Article 3.]

Project No. 11 deals with the "Duties of states in case of civil war." There had been an intention to include a project of this kind among those

drafted by the American Institute, at the request of the Pan American Union. It was given up, however, on the ground that it was inadvisable to suggest the possibility of civil war or insurrection in any one of the American States. But the Commission was of a different opinion, and drafted, of its own accord, a single article of five paragraphs dealing with the question. If such a project were to be included, it must be admitted that it is well done. In fact, it reads like a series of extracts from the Neutrality Act of the United States, of 1818, so similar are the provisions of both.

The last of the twelve projects deals with pacific settlement. It is No. 27 of the projects of the Pan American Union. As it left the hands of the committee of five and was approved by the subcommission on the closing day of the Commission, it was in substance the Pan American project in shortened form, which, in turn, was, so far as possible, based upon projects already in existence, which had stood the test of time. The articles relating to good offices and mediation were taken from the Hague Convention of 1907, for the Pacific Settlement of International Disputes. The section on commissions of inquiry was the convention sponsored by Mr. Gondra, of Paraguay, and therefore bearing his name, of the Fifth Pan American Conference, at Santiago de Chile. It is an excellent convention, providing for the submission of American controversies to examination and report by American commissions of inquiry composed exclusively of American members. It is the first step in what will be a final outcome: American tribunals of arbitration composed of American members, for the adjustment of American controversies; and American courts of justice composed of American judges for the decision of American controversies. The delegates of the United States to the Fifth Pan American Conference at Santiago signed the Gondra convention of inquiry, and the Senate of the United States has ratified the convention. The Government of the United States is, therefore, committed to American agencies for the settlement of American questions.

The convention, admirable in all its details, is a combination of the commission of inquiry at The Hague, with the provision of Secretary of State Bryan's treaties for the advancement of peace—worth, in the opinion of the present writer, all the other international conventions for peaceful settlement put together, by which nations renounced every act of hostility, including, of course, a resort to arms, during the consideration of the question and the preparation of the report of the commission. It is, as Secretary Bryan was accustomed to say, an "angry dispute" which can survive a year's examination. It includes the provision to be found in Secretary Bryan's treaty with France, authorizing the commission to determine the temporary disposition of the property during the consideration of the dispute. It has a new definition of its own which brings the nations to the threshold of the arbitral tribunal, and it is fair to presume, at least in the case of the American Republics, that the door will open at their approach. It is Article 16 which leads the parties to the door. After the report has been delivered to the parties

and to the Pan American Union, they are to have a space of six months within which to renew negotiations and to reach a solution of their difficulties, in accordance with the conclusions of the report. "If, during this new period, they do not reach an amicable solution, they recover their full liberty of action in order to proceed according to their interests."

The third part of the project deals with commissions of conciliation—a subject long in the air, but until recently lacking concrete form and expression. Its value consists in the fact that the Pan American Union is suggested as the commission of conciliation always in existence, and which, therefore, does not need to be constituted when the difficulty arises.

The fourth is friendly composition—likewise an old method which, in modern times, has fallen into disuse. It is the case of a person having the confidence of the parties in dispute (usually a chief of state) to whom the matter may be submitted because of their confidence in his uprightness and judgment. It has recent American approval. The Alsop case was a long-standing claim of the United States against Chile. Upon the suggestion of the claimant, Chile consented to submit in 1909 to the friendly composition of Edward VII, King of England, and at his death, to his son and successor, George V, by whom it was in 1911 decided in favor of the United States, although some of the claims were rejected.[27] As the friendly compositor had disappeared from modern practice, although very familiar in the Middle Ages, King George deemed it advisable to define friendly composition as "an award which shall do substantial justice between the parties without attaching too great an importance to the technical points which may be raised on either side."

Of arbitration, forming the fifth part, little need be said. The project recognizes the procedure of the Second Hague Peace Conference for the pacific settlement of international disputes, and closes with the twenty-third article, to the effect that the parties in dispute may submit their controversy, if they desire its judicial settlement, either to the Permanent Court of International Justice at The Hague, "or to any other court of justice which may be constituted for this purpose by the American Republics."

The twenty-eighth of the Pan American projects contemplates the creation of a Pan American Court of Justice. It was not considered, inasmuch as it seemed to be political to some of the members of the committee of five.

Such, in brief, are the projects recommended to the Sixth Conference of the Americas, set for the month of January, in the year 1928. They will be transmitted by the Pan American Union to the conference, where they are to be considered by the delegates of the American Republics, acting under instructions from their respective governments.

The Subcommission on Private International Law was unexpectedly and overwhelmingly successful. Mr. Bustamante went into conference with his code of international law of 435 articles, and emerged in less than five

[27] This JOURNAL, Vol. V (1911), p. 1079.

weeks with a code of 439 articles. Here and there the articles were modified; here and there he lost one. But four more were added than he had lost. Mr. Bustamante's intention was to give the form of a code to the generally accepted practice of the civilized nations, in the matter of the conflict of laws. This, he did. His plan turned on the acceptance of Article 7 in its original, or in a modified form, which would, nevertheless, enable him to carry out his intention. A project of a convention was prefixed, according to which the American Republics would accept the code, entering reservations to the articles which they were unwilling to accept. In this way, every one of the American Republics could be a party to the code with more or less reservations.

The original Article 7 which made this possible was thus worded:

> Each contracting state shall apply to the nationals of the others the laws of an internal public order of their domicile or of their nationality, according to the system adopted by the state to which they belong.

In Mr. Bustamante's opinion, and ultimately in the opinion of the Commission, it would thus be possible for a Republic adopting the theory of domicile, or of nationality, to be parties to the code. The Republics adopting domicile could accept the code, reserving or rejecting those of its provisions inconsistent with the law of domicile as they understood and applied it. On the other hand, the Republics adopting the theory of nationality could reject the dispositions of the code accepting the principle and practice of domicile. All could thus be parties, but in unequal degrees, the Republics being bound to each other by articles of the code which they had accepted, that is to say, against which they had not interposed reservations.

As there was difficulty in finding a wording of Article 7 which would meet with the approval of the delegates, Mr. Bustamante withdrew Article 7 as originally prepared, and continued the discussion of the code until the various articles had been adopted. He then returned to Article 7, proposing a substitute which, in substance that of the original draft, had the good fortune of meeting with general approval:

> Each contracting State shall apply as personal law that of domicile or that of nationality according to the system which its domestic legislation may have adopted or may hereafter adopt.

It is impossible to give an adequate idea of the 439 articles composing the code which the International Commission of Jurists passed on with its recommendations to the Sixth Pan American Conference of Habana, over which Mr. Bustamante is himself to preside. It is only possible under the limitations of an article which has already assumed ample proportions to outline the table of contents, which contains general rules, and under (1) International Civil Law, covers (a) persons, (b) property, (c) the various modes of acquisition, (d) obligations and contracts; (2) Commercial International Law, (a) merchants and commerce in general, (b) special commercial

contracts, (c) maritime and aerial commerce, (d) prescription; (3) Penal International Law; (4) International Law of Procedure, (a) general rules, (b) competence, (c) extradition, (d) the right to appear in court and its modalities, (e) letters requisitorial and letters rogatory, (f) exceptions having an international character, (g) evidence, (h) appeal for annulment, (i) bankruptcy and insolvency, (j) execution of judgments rendered by foreign courts.

Most of the American Republics prefer the doctrine of nationality, although others have a marked tendency toward the law of domicile, or of the territory in which the legal transaction takes place. A group of American Republics has adopted the law of domicile: Argentina, Bolivia, Chile, Paraguay, Peru and Uruguay. With the exception of Peru, these states strongly advocated the conventions of Montevideo of 1888–89, and projects of later date accepting domicile to such an extent as to endeavor to prevent Mr. Bustamante's code from being taken as the basis of discussion. In this they were defeated, and although they maintained their position throughout, the advocates of Mr. Bustamante's code had the two-thirds majority required for acceptance in the subcommission and the Commission.

The two delegates from the United States registered in the Subcommission on Private International Law, as they desired to testify by their presence, if not by their votes, their interest in the success of the Commission. They explained at the opening session that the Secretary of State, while unwilling to be bound by the proceedings of the Commission, was, nevertheless, desirous of seeing it succeed in its labors, and that he would have the projects as passed carefully examined upon their presentation to the Department of State, in order to see to what extent it would be possible for the Government of the United States to accept their conclusions. The position of the American delegation was thus stated in the plenary session of May 9th:

> The delegation of the United States desires to have its vote recorded in favor of the article reported to this plenary session from Subcommission B, and based upon the project of the Code of Private International Law, prepared by the learned and very distinguished delegate from Cuba, Mr. Bustamante.
>
> In so recording its affirmative vote the delegation does not desire to imply that the articles for which it votes are in accordance with the laws of the various jurisdictions of the United States, forty-nine in all. As a matter of fact and as is well known the jurisprudence of the United States is based in general upon the theory of domicile, while the project of the proposed code is based largely upon the theory of nationality. The reason for this affirmative vote is that the delegation of the United States desires to further the work of codification of Private International Law. It desires, furthermore, to make this recognition of what it believes to be a constructive effort of very considerable value, and it desires that, by the adoption of these articles the forthcoming Pan American Conference at Habana may have before it, for its mature consideration, a substantial basis for the discussion of Private International Law.

In conclusion, the delegation of the United States desires to express the hope that ultimately a code of Private International Law may be proposed for the Americans, by which the opposing principles of the two theories of domicile and nationality may be reconciled. In this happy event it is to be hoped that the United States may be able to join with her sister Republics.

A Subcommission C had been appointed to consider the method by which the labors of the Commission could be continued. As the report prepared by the Peruvian delegate, Dr. Maurtua, unanimously adopted by the Commission, is short, and is difficult to state in abridged form, it is given in full as the unanimous action of the Subcommission:

The International Commission of Jurists, having in view the necessity, demonstrated by experience, of permanently organizing the preliminary work for formulating and developing international law in America, as well as the unification of legislation, recommends that the Sixth Pan American Conference approve the following plan:

1st. To make the International Commission of Jurists of Rio de Janeiro a permanent body, and to provide for a stated, regular session every two years.

2nd. To organize two committees of examination, one at Rio de Janeiro and the other at Montevideo for international public law and international private law, respectively, with the following duties:

(a) To present to the various governments a list of matters susceptible of being submitted to contractual regulation. In this list will be included, besides the matters initiated by the Committees, those which the International Commission of Jurists judges proper to indicate, on terminating each of its sessions.

(b) To decide, in accordance with replies received, what matters are generally considered ripe for discussion and appropriate for legislation.

(c) To submit to the various governments the different viewpoints from which matters selected may be contemplated; to petition and obtain an indication along general lines of the opinion of each government.

3rd. To entrust the Executive Council of the American Institute of International Law with the duty of studying scientifically the matters referred to in the above article, with the task of drawing conclusions and presenting them with proper explanations duly supported in reports, inasmuch as they are to serve as bases of discussion by the International Commission of Jurists for the definite formulation of the ante-projects intended for Pan American Conferences.

Whenever possible, the above information shall be submitted to the deliberations of the Institute at its biennial plenary sessions.

4th. To organize in Havana an office and committee for directing the studies of comparative legislation and for the unification of legislation.

5th. The three above mentioned committees are to be formed by the various governments from the members of their respective national societies of international law.

They shall communicate with the various governments and with the Executive Council of the Institute, through the Pan American Union.

6th. The Pan American Union, in so far as its by-laws permit, shall coöperate in all the preliminary legislative work referred to in the above articles.

It is evident that the codification of international law is in full blast, that the Institute of International Law, as a scientific body has aided the codification of international law in international conferences, and that the American Institute of International Law is aiding through its labors the codification of international law through Conferences of the American Republics in the western hemisphere.

The seed scattered to the wind by Lieber is bearing ample fruit in the old world of his birth, and in the new world of his choice; and the writer of this article is doubly happy that the labors of each are, in accordance with Lieber's suggestion, aided by the support of the Carnegie Endowment for International Peace, of which he is Secretary.

THE RENDITION OF THE INTERNATIONAL MIXED COURT AT SHANGHAI

By Manley O. Hudson
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The troubled history of exterritoriality in China, at any rate in that part of China which is known as the International Settlement at Shanghai, seems to have entered upon a new phase at the beginning of 1927 with the rendition of the International Mixed Court at Shanghai and the creation of the Shanghai Provisional Court to replace it. These events mark the culmination, for the time being, of a long series of negotiations which have been attended by such tragic incidents that they have aroused much more than local interest. If the complete history of the negotiations could be traced, it would probably reveal many of the causes underlying the difficulties of foreign communities in China. The latest developments represent an effort to deal with a long-standing grievance of the Chinese people, and they may prove a beginning of significant modifications yet to be effected in the régime of exterritoriality.

THE INTERNATIONAL SETTLEMENT AT SHANGHAI

From a juristic point of view, there is hardly a more curious community in the world than Shanghai. The situation at Tangier may be as complicated, but the interests affected are of lesser magnitude. Some of the same problems have arisen at Alexandria, but without involving so many foreign governments. In the size of its population and the extent of its foreign trade, Shanghai would easily outrank some of the independent countries of the Western world. If all parts of the Shanghai area—Nantao, the City, the French Concession, the International Settlement, Chapei, part of Paoshan, Pootung and Woosung—be taken together,[1] it has a population approaching two millions, of whom less than 50,000 are foreigners. In 1926, it was estimated that the International Settlement sheltered about 850,000 people, 30,000 of them being foreigners, though 7,500 of the foreigners were living on municipal roads outside the actual limits of the Settlement.[2] In 1925, the bordering French Concession had a population of almost 300,000, including less than 8,000 foreigners, and less than 1,000 French nationals.[3] A few foreigners live, also, in the surrounding districts.

[1] These districts comprise what is frequently called Greater-Shanghai, or the Shanghai area.

[2] Shanghai Municipal Council, Annual Report, 1926, p. 138.

[3] *Conseil d'Administration Municipale de la Concession Française, Compte-Rendu*, 1925, p. 185.

In the past few years, about 10,000 refugees have come into the Shanghai area from Russia,[4] and of its total number of foreigners, fully 14,000 are Japanese.[5] Of the whole population of the community, the foreigners are not three per cent; and of the population in those parts which are under foreign control they are not four per cent. But the foreign trade of Shanghai gives it an international importance which these figures do not reveal. On a basis of tonnage, it ranks among the seven largest ports in the world.

It is only since 1843 that Shanghai has achieved its importance as a commercial center. That was the date of its formal opening to foreign traders. In the beginning, they constituted a distinct part of the community, living in defined areas. But that condition has long since ceased to exist, and today the foreign and Chinese communities are so commingled in business relations and in the residence districts that any separation of them seems impossible. Their interests have therefore become common, but the districts under foreign and Chinese control remain quite distinct. It is a situation in which clashes between the two groups would inevitably occur, even if neither entertained suspicion of the other, nor sought in any way to extend its power. But with the disturbed conditions prevailing in other parts of China during the past decade, and with the Chinese hostility to what is regarded as foreign encroachment, the clashes have become so frequent that Shanghai now stands out as a storm center in China, and municipal questions which might otherwise have commanded but local interest now challenge the attention of Foreign Offices in remote parts of the world. For this reason, if not also as an experiment in the international administration of justice, the rendition of the Mixed Court would deserve more than passing notice.

The Foreign Settlement at Shanghai north of the Yang-King-Pang, which has come to be known as the International Settlement, has grown from the fusion in 1863 of an English Settlement established in 1843 and a so-called American Settlement which grew up several years later. The boundaries of the latter were not delimited until June, 1863, and the amalgamation was effected in October of the same year. The Land Regulations which serve the Settlement as a kind of municipal charter, were promulgated in 1869, and have undergone some changes as the boundaries of the Settlement have been extended. The Land Regulations now in force were agreed upon in 1898 by the ministers of the Powers possessing exterritoriality at Peking, and were proclaimed to be in force in "the entire area of the International Settlement" by the Taotai, a local Chinese official, in 1899.[6] The instru-

[4] Shanghai Municipal Council, Annual Report, 1926, p. 52.

[5] *Ibid.*, 1925, p. 176.

[6] *Ibid.*, 1899, p. 262. The history of the Land Regulations and the Mixed Court may now be traced in two useful volumes by Anatol M. Kotenev, Shanghai: Its Mixed Court and Council (1925), herein referred to as Volume I, and Shanghai: Its Municipality and the Chinese (1927), herein referred to as Volume II. Both were published by the North China Daily News and Herald, Ltd., Shanghai.

ment is often referred to as a treaty,[7] but its legal basis is less formal, and neither by the Chinese nor by the foreign Powers is it regarded as such. Any amendments or additions to the Land Regulations must "be consulted upon and settled by the foreign consuls and local Chinese authorities, subject to confirmation by the foreign representatives and supreme Chinese Government at Peking";[8] but this requirement can hardly apply to a negotiation of a general agreement as to the Settlement by the Powers concerned. To the regulations, by-laws are attached which may not be modified in any important way without the approval of a majority of "the Consuls and Ministers of foreign Powers having treaties."[9]

The Land Regulations provide for the International Settlement to have an "executive committee or council," which has come to be known as the Shanghai Municipal Council. Its nine members are elected by the foreign rate-payers who possess certain property qualifications. The present membership includes five British, two American and two Japanese nationals, but in the past there have been German and Russian members. The Chinese rate-payers do not participate in the election of the members of the Council, and no Chinese have ever been elected.[10] The Council has wide powers as to levying rates, appointing personnel, administering public funds, constructing and maintaining roads and drains, enacting building regulations, maintaining a "watch or police force," and performing other municipal functions. It is responsible only to the rate-payers for its discharge of these functions, for although it may be said to be under the local Consular Body in some senses, it reports only to the rate-payers and the Consuls exercise no direct control over its action. It is the Consuls who fix the dates for electing members of the Council and for holding the meetings of the rate-payers, and who perform certain offices with reference to the transfer of land. They also appoint certain of their number to sit as a "Court of Foreign Consuls," which may give judgment against the Council or restrain its action. But they have no power to interfere in the local administration, and short of resorting to an amendment of the Land Regulations, which is difficult to achieve in fact, they cannot reverse action taken by the Council within the powers conferred by the Land Regulations. This

[7] At a rate-payers' meeting on April 13, 1927, the Chairman of the Municipal Council spoke of the Land Regulations as "a solemn and inviolable compact between sovereign nations," possessing "all the sanctity of a treaty." He added that "in substance and effect, although not in form, it is a treaty of the highest class being as it is not merely a bilateral agreement between two sovereign Powers, but an agreement to which many sovereign Powers are parties." Shanghai Municipal Gazette, April 14, 1927.

[8] Article 28 of the Land Regulations. A useful edition of the Land Regulations is included in a Handbook of Local Regulations, published by the Shanghai Municipal Council, 1918. The text may also be found in Kotenev, I, pp. 557 *ff.*, and in Hertslet, China Treaties, II, p. 664.

[9] Article 11 of the Land Regulations.

[10] Participation of Chinese members was approved by the rate-payers on April 14, 1926, but it has not yet been negotiated. See the Council's Annual Report, 1926, p. 60.

large independence of the Council has led to the frequent use of such misleading expressions as the "nascent republic of Shanghai."[11]

ADMINISTRATION OF JUSTICE

The problem of administering justice in such a community presents peculiar difficulties, which the multiplicity of courts does not simplify. For actions against the Municipal Council itself, resort must be had to the "Court of Foreign Consuls" provided for in the Land Regulations (Article 27), to be "established at the beginning of each year by the whole body of Treaty Consuls." The establishment of this court was sanctioned "provisionally" in 1869 by the diplomatic representatives at Peking of the United States, Great Britain, France, Germany and Russia, "as an experiment subject to future modification if found expedient." The fact of its continuance to the present time is probably due less to the success of the experiment than to the difficulty of changing the *status quo*. In recent years, at any rate, it has heard few cases; but two cases were heard in the three years, 1922, 1923, and 1924. Many of the cases have related to claims on the Municipal Council's superannuation fund. Few of them relate to claims for damages. No regular system of publishing its judgments has been adopted,[12] and it is very doubtful whether serious attempt is made to apply any definite system of law. The rules of procedure adopted in 1882 are very meager.[13] On the whole, the "Court of Foreign Consuls" would seem to be more in the nature of an administrative tribunal than of an ordinary court, and its usefulness as such has never been greatly developed.

The nationals of the various Powers which enjoy exterritoriality may be sued or prosecuted only in the courts of their respective countries. Fifteen Powers now exercise jurisdiction over their nationals in Shanghai, most of them having consular courts for the purpose. In 1865, a special Supreme Court was established by the British Government; in 1906, the United States Court for China was established; and a similar tribunal is now maintained in Shanghai by Japan. French nationals are subject to the French court which sits in the French Concession. The volume of business before these foreign courts is indicated by the fact that in 1926, 843 foreigners are reported to have been summoned or apprehended and charged before such tribunals.[14]

The nationals of the Powers which do not enjoy exterritoriality, which now include Germany and the Union of Socialist Soviet Republics, are on

[11] See, for example, Hsia, Studies in Chinese Diplomatic History (1924), p. 20.

[12] The judgments are occasionally printed in the Annual Report of the Municipal Council. The Annual Report, 1925, p. 185, reports an interesting case in which the Republic of China sought an injunction to prevent the destruction of certain arms and ammunition, which had been ordered by the Mixed Court. See also the Annual Report, 1914, p. 107B.

[13] Republished in pamphlet form in 1907. The text is to be found in Hinckley, American Consular Jurisdiction in the Orient (1906), p. 244; Kotenev, I, p. 556.

[14] See Shanghai Municipal Council, Annual Report, 1926, p. 54.

the same footing as nationals of China with respect to the jurisdiction of Chinese courts. For neither class of persons did the Land Regulations create any special tribunal. But in the application and amplification of treaty provisions which originally covered mixed cases, such a tribunal has been developed. It was the treaty made by China with the United States in 1844, which first envisaged the joint action of Chinese and foreign officials in controversies "between citizens of the United States and subjects of China" (Article 24). Later treaties contained fuller provisions for foreign participation in mixed cases, but they did not go to the extent of authorizing foreign participation in the adjudication of purely Chinese cases. The growth of the foreign community at Shanghai and the firm establishment of the International Settlement led the foreigners to desire more ample powers of police jurisdiction, and this desire has come into a certain measure of fulfilment.

THE MIXED COURT BEFORE 1911

Soon after the enlargement of the English Settlement by the inclusion of the so-called American Settlement in 1863, the first steps were taken toward the establishment of a Mixed Court. A police force was already functioning, but when Chinese were accused of crime they had to be handed over to the local Chinese officials outside the Settlement for trial. The cases soon became very numerous in which foreigners were interested as prosecutors or as plaintiffs, and the resort to Chinese courts outside the Settlement became inconvenient.[15] In 1863, the Consular Body at Shanghai proposed that the Municipal Council itself be given jurisdiction over foreigners over whom no local consul had jurisdiction, and it was later proposed that a municipal police court should be established. On May 2, 1864, a mixed court was set up in the British Consulate, composed of a Chinese official of inferior rank and a British assessor. Later an American assessor sat, and in more recent times assessors of other nationalities sat. The jurisdiction was not clearly defined; the court acted at first as a police court, dealing with prosecutions against Chinese for minor offenses. Soon, however, it began to deal with mixed civil cases, in which foreigners enjoying exterritoriality were plaintiffs and Chinese were defendants. In 1867, an effort was begun to place this court on a firmer legal foundation; it was removed from the British Consulate in 1868; and in 1869 agreement was reached for the formal establishment of the Mixed Court.

The regulations agreed upon by the local Chinese official, the Taotai, and the diplomatic representatives of the United States, Great Britain, France, Russia and Germany, were published at Shanghai on April 24, 1869, by the British Consul.[16] They were declared to be in force for one year, but were destined to have a longer history. The ten rules constituted merely a

[15] See Sir Sydney Barton's paper on "The Shanghai Mixed Court," 4 Chinese Social and Political Science Review (1919), p. 31.

[16] The text may be found in Hinckley, American Consular Jurisdiction in the Orient, p. 245; Kotenev, I, p. 70; Hertslet, China Treaties, II, p. 662.

skeleton for the organization of the Mixed Court and an outline of its jurisdiction. The Chinese agreed to designate a sub-prefect to reside in the Settlement, to "decide all civil and commercial suits between Chinese residents within the Settlement and also between Chinese and foreign residents in cases where Chinese are defendants, by Chinese law." In mixed cases, a consul or his deputy was to sit with the sub-prefect. In graver criminal cases, the jurisdiction of the regular Chinese district court was not superseded. The sub-prefect had jurisdiction over unrepresented foreigners, but his finding had to be "submitted for the Taotai's approval, who will consult with some treaty-Power consul on the subject." The powers of deputies or assessors named by the consul were only vaguely defined, and it was long a subject of dispute whether they were to act as watchers or as co-judges.

The Mixed Court thus established functioned in the International Settlement from 1869 to 1911. Many were the contests about its powers and practices. In 1885, a conflict between the prefect and a consular assessor led to the closing of the court for a short time.[17] The methods of punishment ordered by the court aroused public interest from time to time. The power of the Chinese authorities to effect arrests within the Settlement gave rise to prolonged controversy; in 1902 the rate-payers urged the Municipal Council to prevent the removal of Chinese arrested within the Settlement without a preliminary inquiry at the Mixed Court. The assumption of powers by the Mixed Court magistrate, as a representative of the Chinese residents of the Settlement, and particularly his exercise of the power to issue proclamations, was often disputed. Many attempts were made, but unsuccessfully, to modify the rules of 1869, which had been adopted only provisionally. In 1898 a thoroughgoing reorganization of the court was proposed by the Municipal Council and the local bar.[18] In 1906 proposals were made by the Consular Body at Shanghai,[19] but they failed of adoption. In 1909 the court was said to be an "authority which affords little of the certitude of a foreign court of justice and little of the latitude of a native yamen," having "the disabilities of both and the advantage of neither."[20] It may be doubted whether the Mixed Court was at any time during this period a satisfactory tribunal. Its constitution of 1869 soon became out of date, and its procedure was largely dependent upon the changing results of a continual struggle between the magistrates and the foreigners.

THE MIXED COURT AFTER 1911

A new chapter in the history of the Mixed Court began in 1911. In the early part of that year, the Chinese authorities sought to abolish it and to

[17] Kotenev, I, p. 94.
[18] Shanghai Municipal Council, Annual Report, 1898, p. 69.
[19] See Hinckley, American Consular Jurisdiction in the Orient, p. 247.
[20] Shanghai Municipal Council, Annual Report, 1909, p. 57.

create in its place a branch of the Provincial Supreme Court, but their proposals were rebuffed by the Consular Body.[21] Later in the year, the situation was completely changed by the revolution in China. In November, 1911, two of the magistrates fled from Shanghai and it is commonly said that they failed to leave the court's funds behind them. Shanghai was for a time independent of the Manchu authority, and for a short period the Mixed Court was closed altogether. On November 10, 1911, the Consular Body took the situation in hand and issued a proclamation stating that the consuls of the Treaty Powers had by virtue of their position and authority and as a measure of expediency confirmed three Chinese magistrates "to act under the guidance of and in concert with the assessors of the said consuls as heretofore." [22] Soon thereafter the Municipal Council undertook to administer the financial affairs of the court on behalf of the Consular Body, and the prisons were put into the charge of the municipal police. On January 5, 1912, the Consular Body notified the Council that "as a temporary measure, the hearing of Chinese civil cases in the Mixed Court will henceforth be watched by foreign assessors," [23] and three assessors were named for that purpose. On January 3, 1912, the Consular Body had adopted a rule that "foreign assessors shall sit and watch the case, and shall not interfere." Thereafter, also the court dealt finally with all criminal cases, including those of a graver nature, without confining itself to a preliminary inquiry with a view to later trial in the Chinese District Court.

The effect of these changes was to place the Mixed Court under the control of the Consular Body and to make it independent of the general system of Chinese courts. The Chinese magistrates were thereafter appointed by the Consular Body, their number being increased first to five, and in 1923 to seven; and their salaries were paid by the Consular Body from a so-called "Taotai's Fund," which in later years came from the Municipal Council. The magistrates thus came in time to be looked upon as servants of the foreigners, and their prestige among the Chinese suffered accordingly. Inevitably also, they lost their ability to control the proceedings. Even in purely Chinese cases, the assessors were on hand to "watch" the proceedings; and in mixed cases the assessors soon came to play the dominant rôle. The judgment was still, nominally, the judgment of the magistrate; but it was frequently written by the assessor and sometimes published as the judgment of the assessor.[24] Progressively, the Mixed Court came more completely under foreign control and remained a Chinese court in name only.

The procedure in the Mixed Court continued to be regulated by the

[21] Kotenev, I, p. 168.

[22] For the text of the proclamation, see the Shanghai Municipal Gazette, November 16, 1911.

[23] Shanghai Municipal Gazette, January 18, 1912.

[24] See, for example, 1 China Law Review, 43, 346, 446, 447.

inadequate rules of 1869, though some additional rules were drawn up in 1902. Various practices had grown up which were not formulated in the rules, and these were gradually adapted to the new conditions. In 1912 certain rules of procedure for the court were drawn up by the Consular body,[25] but they were incomplete and soon became in turn inadequate. In 1914 an effort was made to codify the Court's practise in a more elaborate set of rules of procedure; but the restatement was not formally approved by the Consular Body, and though it was followed in practise as a compilation of rules which had become informally established and cited before the court as such, it was never a binding *reglement*. Various changes were made in these rules from time to time.[26] They were republished with some changes in June, 1919, in English and Chinese;[27] and were again republished in pamphlet form in English in 1925. In 1922 an important change was made in the procedure with regard to security in foreign and Chinese civil cases.[28]

The court continued to apply Chinese law and it is interesting to note that in 1924 it decided that it would not be bound by precedent.[29] It entertained all sorts of cases, assuming jurisdiction even to grant divorces. A divorce from his Russian wife was granted to an American citizen in 1926,[30] and two Russians were divorced in the same year. The volume of business became very large. In 1925 the court held 2,082 sessions, and dealt with 80,529 criminal cases, 2,831 Chinese civil cases, and gave judgment in 192 foreign civil cases.[31] In 1926 the court held 2,186 sessions, and dealt with 103,932 criminal cases, 2,848 Chinese civil cases, 606 foreign civil cases, and in addition 1,209 rent cases and 206 inquests.[32] Its work and its difficulties were increased after the War, by the abandonment of exterritoriality by Germany and the Union of Socialist Soviet Republics. Jurisdiction began to be taken over German nationals in 1917; in that year, also, an action was brought by the Municipal Council for the rent on the German post office.[33] In 1924, the Consular Body agreed that German-speaking assessors would be named by the senior consul to sit in German cases, and in practice they were chosen from eligibles named by the consuls of formerly neutral countries.

One of the outstanding defects in the court during the period from 1911 to 1926, was that no appeal was allowed. Prior to 1911, it was possible to appeal to the Taotai and the consul of the nationality of a foreigner concerned. The office of the Taotai was partly filled after 1911 by a local Commissioner for Foreign Affairs. Various proposals were made for

[25] Kotenev, I, p. 174.
[26] See 1 China Law Review, 42.
[27] See Kotenev, I, p. 321.
[28] Published by the court on a single sheet.
[29] Shanghai Municipal Gazette, February 28, 1924.
[30] *Ibid.*, April 1, 1926.
[31] Shanghai Municipal Council, Annual Report, 1925, pp. 39–41.
[32] *Ibid.*, 1926, p. 37.
[33] *Ibid.*, 1917, p. 134a.

establishing a new court of appeal,[34] and at one time the Chinese authorities seem to have assumed to establish such a tribunal, only to meet with vigorous protest from the Consular Body. Yet the practise persisted to give notice of appeal; it was expressly provided for by the rules published in 1914, but these sections were omitted when the rules were republished in 1918.[35] Inadequate provision for the extradition of persons charged with crime was another defect. There were also frequent scandals with reference to false registration of persons in various consulates.[36] In later years an awkward situation was created by the Chinese courts' refusal to give effect to judgments of the Mixed Court. The latter functioned without any mandate from the Chinese Government after 1911 and the Chinese authorities felt themselves in no way bound to recognize its power. The question was certain to arise before the Chinese Supreme Court, sooner or later, and when it did arise there that court declared in no uncertain terms against the validity of Mixed Court judgments. It was held that "a case which has been decided in the Mixed Court may be tried by judicial courts of competent jurisdiction elsewhere in China, and a plea of *res judicata* cannot be entertained."[37] Later, in 1925, in reply to an inquiry from the Procuratorate-General, the Supreme Court at Peking is reported to have said that "the Mixed Court at Shanghai is not a legal judicial tribunal," and has therefore "no power to arrest a Chinese defendant"; and although the Commissioner for Foreign Affairs for Kiangsu had forwarded a warrant for arrest, the Supreme Court advised that no assistance should be extended by local Chinese authorities.[38]

EFFORTS TO REPLACE THE MIXED COURT

Though the foreign-controlled International Mixed Court functioned from 1911 to 1927, it was not permitted to do so without repeated efforts by the Chinese to regain the control which they had lost. In 1914 and 1915 negotiations were conducted at Peking for its rendition to the Chinese, and at one period they seemed to be on the point of succeeding. A plan of rendition, consisting of five points, was formulated; but its adoption came to be conditioned upon the successful negotiation of other more or less unrelated questions. An effort was then being made to extend the boundaries of the International Settlement, and the Diplomatic Corps is said to have offered the rendition of the court in "exchange for the expansion of the Settlement area."[39] The negotiations doubtless became more difficult

[34] See Kotenev, I, p. 198.

[35] *Ibid.*, p. 381.

[36] For example, the alleged abuse of registration by the Brazilian Consulate-General, reported in the Shanghai Municipal Gazette, March 11, 1926, p. 69.

[37] Opinion given on appeal from Kiangsi, 11th day, 3d month, 6th year of the Chinese Republic, No. 592.

[38] 2 China Law Review, p. 207.

[39] 3 China Law Review, p. 48.

during the period of the War, and for a time no further progress was made.

At the Paris Peace Conference in 1919, where the Chinese representatives sought the complete restoration of the foreign concessions and settlements, they complained that in the Mixed Court at Shanghai the "foreign assessor not only watches the proceedings but virtually tries and decides the case." Pending final restoration, they asked that foreign assessors be excluded from participating in the "trial or decision of cases wherein Chinese citizens alone are concerned."[40] But neither at Paris, nor at the later Washington Conference in 1922, was any relief given to China. The Commission on Extraterritoriality in China, provided for by the Washington Conference, merely recommended in its report of September 16, 1926, that the organization and procedure of the existing special mixed courts "should, as far as the special conditions in the settlements and concessions warrant, be brought more into accord with the organization and procedure of the modern Chinese judicial system."[41]

Meanwhile the dissatisfaction with the Mixed Court had grown. The negotiations for its rendition had been resumed at Peking on October 26, 1922, when the Chinese Government proposed a modified plan of rendition, according to which "purely Chinese criminal cases as well as purely Chinese civil cases should all be tried by Chinese officials without the aid of a foreign assessor," and in which appeal in criminal cases was envisaged. The negotiations continued for almost four years before they reached a conclusion. In this interim popular feeling on the question ran very high among the Chinese. When an International Commission of Judges investigated the incident of May 30, 1925, Justice E. Finley Johnson placed first among the causes of many years standing which led to the disturbances on that date, "the status of the Mixed Court"; and he reached the conclusion that "those in authority should as speedily as possible bring to a close the negotiations relating to the status and character of the Mixed Court."[42] The demands formulated by various Chinese bodies after the incident of May 30, 1925, also dealt with the question. On June 7, 1925, a group of students and labor unions demanded that "the Mixed Court shall be returned to China forthwith; in cases in which Chinese are the only parties concerned, only a Chinese magistrate shall sit and the assessors shall not be empowered to sit or watch the proceedings, and in cases where foreigners sue Chinese the assessors shall be permitted to sit, but they shall not be empowered to interfere in the judgments; Chinese criminals shall be indicted according to the Chinese criminal code or the municipal by-laws, but not by both; all the affairs of

[40] See 5 Chinese Social and Political Science Review, pp. 148–152.

[41] Report of the Commission on Extraterritoriality in China, as published in Washington by the Department of State, p. 108.

[42] See the separate report of E. Finley Johnson, Acting Chief Justice of the Supreme Court of the Philippine Islands, in the China Year-Book, 1926–7, pp. 946, 950.

the court shall be administered entirely by Chinese, including the work of the registrar and the prosecuting solicitor, and all officials of the court must be appointed to their places only by the Chinese Government."[43] About the same time, the Chinese Chamber of Commerce demanded the "rendition of the Mixed Court—complete restoration to the state consistent with the provisions of the treaties"; and "when any Chinese is prosecuted under the Criminal Code of the Republic of China or under the municipal by-laws, the prosecution shall be in the name of the Republic and not in that of the Shanghai Municipal Council."[44] The Chinese Government was clearly acting on popular opinion when in its note of June 24, 1925, it demanded the "rendition of the Mixed Court" as one of the measures of relief sought following the affair of May 30, 1925.

But the negotiations at Peking failed, partly because of the difficulty of reaching agreement on foreign participation in the trial of Chinese criminal cases involving the peace and order of the Settlement. In May, 1926, new negotiations were begun at Shanghai, by a committee acting on behalf of the Consular Body and Dr. V. K. Ting, Director of the Shanghai-Woosung Commercial Port, and Mr. Hsu Yuan, Commissioner for Foreign Affairs, acting on behalf of the Kiangsu Provincial Government. The suggestion that a deputy of the senior consul should sit in certain cases affecting the peace and order of the International Settlement, enabled greater progress to be made than had been possible at Peking, and after eight conferences had been held,[45] a "provisional agreement" for the rendition was signed on August 31, 1926. The Chinese text of the agreement was signed by the Chinese representatives, and the English text was signed by the Consuls-General of the United States of America, Norway, Belgium, Great Britain, Sweden, Japan, Brazil, France, Italy, Portugal, Denmark, Switzerland and the Netherlands, and the consuls of Spain and Mexico.[46] The agreement was later approved by the Diplomatic Corps and the Chinese authorities at Peking. It is therefore to be regarded as an arrangement for carrying out the treaty provisions concerning exterritoriality which has been approved by all the interested and so-called "treaty Powers." But it is not a multipartite treaty, and perhaps lacks the force which would attach to an agreement for which the regular treaty-making machinery of the signatory Powers had been employed.

THE NEW PROVISIONAL COURT

The provisional agreement of August 31, 1926, describes itself (Article 7) as an agreement "for the rendition of the Mixed Court to the Kiangsu

[43] China Year Book, 1926-27, p. 928.

[44] *Ibid.*, p. 929.

[45] See 3 China Law Review, p. 48.

[46] Germany, Finland, Austria, and the Union of Socialist Soviet Republics are also represented at Shanghai, but as none of these Powers now enjoys exterritoriality in China, their representatives did not sign the provisional agreement. The Consul-General of France

Provincial Government."[47] The Province of Kiangsu was then controlled by the government at Peking, and previous negotiations had envisaged a rendition to the Peking Government, since the administration of justice in China is organized as a national system. But it was the provincial and not the central government which agreed to set up "in place of the Mixed Court in the International Settlement at Shanghai," a new tribunal to be known as the Shanghai Provisional Court. Question may arise in the future as to the degree of continuity existing between the two tribunals. "Rendition" seems to be a term of special application. It seems to have been intended, when the agreement was drawn, that the old court should disappear altogether. The new Provisional Court was to deal with all civil and criminal cases in the Settlement except those "which in accordance with the treaties involve the right of consular jurisdiction." Before the actual rendition was made on January 1, 1927, an exchange of notes was effected which provided a bridge between the two régimes, and a Joint Legal Commission formulated certain understandings which supplemented and clarified the terms of the agreement itself.[48]

The Provisional Court is now to exercise much the same jurisdiction as that previously exercised by the Mixed Court. Moreover, foreigners are to sit in the court in certain cases, either as deputies of the senior consul or as officials sent by a consul or by the senior consul. A deputy of the senior consul is to "sit with the judge to watch the proceedings," in criminal cases "which directly affect the peace and order of the International Settlement," and whenever the accused is in the employ of a foreigner who enjoys exterritorial rights. The Joint Legal Commission agreed upon certain offences which should fall within the category of cases affecting the peace and order of the Settlement, and included various offences which affect the interests of the Municipal Council in both its proprietary and its governmental capacities. The senior consul's deputy is forbidden to put questions to a prisoner or a witness without the judge's consent, and his concurrence is not necessary to the validity of the court's judgment, though he may record his objections. A consular official is "to sit jointly with the judges in accordance with the provisions of the treaties," in criminal cases in which a foreigner enjoying

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signed, as he customarily coöperates with the Shanghai Consular Body, though France has a separate concession. The Sino-Belgian treaty was still in force at the date of signature, though it is now regarded as having been terminated by the Chinese Government.

[47] The text of the provisional agreement is reprinted in the Supplement to this JOURNAL. It was officially published in the Shanghai Municipal Gazette, February 18, 1927, p. 46, and is reprinted in the Shanghai Municipal Council, Annual Report, 1926, p. 63 *ff*. It is published also in 3 China Law Review, p. 49 *ff*. One of the preliminary drafts was published in 3 China Law Review, p. 1 *ff*.

[48] These understandings were published in part in the Shanghai Municipal Gazette, February 18, 1927. The Joint Legal Commission consisted of F. E. H. Groenman, N. F. Allman and A. D. Blackburn representing the Consular Body, and Hsu Yuan, Chen Dingsai, and Y. S. Ziar representing the Chinese authorities.

exterritoriality is complainant; it is not clearly stated whether in such cases a deputy of the senior consul is also to sit, if they fall within the description of his competence, though it may perhaps be inferred that this is not the case from the provision that the official is to be sent by "the Consul of the nationality concerned or the Senior Consul." In practise, the official and the deputy do not sit together in such cases. In criminal cases where the accused is a foreigner who does not, and the complainant is a foreigner who does, enjoy exterritoriality, the court itself is to ask a consular official belonging to a third nation to attend the trial in order to watch the proceedings.

In civil cases, the consular official is to "sit jointly with the judge in accordance with the provisions of the treaties," only when the plaintiff is the Shanghai Municipal Council or a foreigner who enjoys exterritoriality. In civil cases between Chinese, only the Chinese judges will sit in the future. In civil cases where a foreigner who does not enjoy exterritoriality sues a Chinese or is sued by a Chinese or by another such foreigner, the agreement and supplementary understandings make no provision for any foreign representation.

With these provisions for the participation of deputies of the senior consul and consular officers, it may be thought that the Provisional Court remains a mixed court, and that one mixed court has only been replaced by another. In some degree this is true. The Provisional Court is not on the same basis as an ordinary Chinese court; even in the latter consular officials of Treaty Powers may sit to watch the proceedings when their nationals are parties to the controversies under examination.[49] Nor is it a revival of the Mixed Court as it existed before 1911. The Chinese have regained complete

[49] The treaty between China and the United States of November 17, 1880, made this privilege reciprocal. It provided (Article 4) that "when controversies arise in the Chinese Empire between citizens of the United States and subjects of His Imperial Majesty . . . such cases shall be tried by the proper official of the nationality of the defendant. The properly authorized official of the plaintiff's nationality shall be freely permitted to attend the trial, and shall be treated with the courtesy due to his position. He shall be granted all proper facilities for watching the proceedings in the interests of justice. If he so desires, he shall have the right to present, to examine, and to cross-examine witnesses. If he is dissatisfied, he shall be permitted to protest against them in detail. . . ." In recent years, cases seem to have been infrequent in which either Chinese officials or American consular officials have exercised this privilege. The Commission on Extraterritoriality in China recommended that "as a general rule mixed cases between nationals of the Powers concerned as plaintiffs and persons under Chinese jurisdiction as defendants should be tried before the modern Chinese courts (Shan P'an T'ing) without the presence of a foreign assessor to watch the proceedings or otherwise participate." Report of the Commission on Extraterritoriality in China, p. 108. In line with this recommendation, on March 16, 1927, the Consul-General of the United States at Shanghai notified the various Chinese authorities at Ningpo, Wenchow, Soochow, Hangchow and Shanghai that he would not "except in unusual circumstances exercise the rights set forth in Article 4 of the Sino-American treaty of 1880, in so far as relates to an American official watching cases brought by Americans against Chinese in the Chinese courts." But he added that cases brought in the Shanghai Provisional Court and in the International Mixed Court at Kulangsu, Amoy, are not affected by this notice.

control over purely Chinese civil cases, and over certain Chinese criminal cases; and many changes in personnel and procedure serve to emphasize the return to a régime of Chinese administration. If the Provisional Court must still be called a mixed court, that does not indicate that the rendition has no meaning or effect.

SOLUTIONS OF VARIOUS QUESTIONS

Numerous questions were left open by the agreement, some of which were not settled in the understandings which were contemporaneous with the rendition. Not the least difficult of them is the question as to the status of a consular official as distinguished from a senior consul's deputy. The latter is quite clearly limited to watching; he is not to question a witness or a prisoner without the consent of the judge, and he need not concur in the judgment. The former is in most cases to "sit jointly with the judge in accordance with the provisions of the treaties." The use of different expressions at once suggests a difference in function. But what is the extent of the difference? Does one who "sits jointly" become a co-judge? If so, is his concurrence necessary? The "provisions of the treaties" do not give a definite answer. The Sino-French Treaty of 1858 is perhaps the clearest in providing (Article 35) that failing the amicable settlement of a claim by a Frenchman against a Chinese, the consul will seek the assistance of the competent Chinese official and after a joint examination of the dispute the two will settle it according to equity.[50] Perhaps this is not applicable, however; it was not agreed upon with reference to this specific tribunal, and the most-favored-nation clause in other treaties ought not to embrace a matter for which those other treaties make specific provision of a different sort. The expression in the provisional agreement seems to be one of those which can only be defined as meaning is lived into them. In practise, the consular official is supplied with a case-sheet in mixed criminal and civil cases, which in addition to giving the number of the case and the names of the parties, contains space for a "translation of order or judgment." [51]

The understandings reached at the time of rendition cover a variety of questions which were not settled by the original agreement. The validity of the previous final judgments of the Mixed Court, which had been denied by the Supreme Court at Peking, was confirmed, and such judgments and the judgments of the newly created Provisional Court were given the same validity as judgments of the regular provincial courts of China. The territorial jurisdiction of the Provisional Court was somewhat enlarged by extending it to mixed criminal cases arising on foreign vessels within the harbor limits, or on foreign property outside the limits of the Settlement but within the districts of Shanghai and Paoshan. The provisional agreement of June 28, 1902, defining the respective jurisdictions of the mixed courts of

[50] Maritime Customs, Treaties Between China and Foreign States, 2d ed., I, p. 831.

[51] Copies of these sheets were supplied to the writer by an officer of the court.

the International Settlement and the French Concession,[52] was continued in force for defining the respective jurisdictions of the Provisional Court and the mixed court of the French Concession. The Kiangsu Provincial Government agreed, in a note of November 27, 1926, that ten foreigners should be employed by the Provisional Court "in order to secure continuity" with the old régime; and it accepted a later proposal of the Consular Body that these persons should be detached by the Municipal Council, and paid the salaries and house-rent to which they were entitled in the municipal service. As the salaries paid by the Municipal Council are very liberal, this has resulted in a situation where some of these foreign employees receive a larger salary than the judges of the Provisional Court. The expense of the new court is borne by the Provincial Government, which has segregated for this purpose the land tax revenue from all foreign title deeds in Shanghai.

One of the questions upon which stress was laid in the negotiations related to the appearance of foreign lawyers in the Provisional Court. Lawyers have not long enjoyed many privileges in the Chinese courts, and while the Mixed Court was under Chinese control Chinese lawyers were not admitted to practise in it.[53] Foreign lawyers were less restricted, though only in 1914 was a court roll instituted. In recent years, the Mixed Court bar had become very numerous, and it seemed necessary to safeguard the continuance of its members' practice in the Provisional Court.[54] The understanding therefore secured to foreign lawyers the privilege of appearing for either party in the Provisional Court in all cases in which a consular officer sits with the Chinese judge, in all cases in which the Shanghai Municipal Council acts as prosecutor, and in civil actions brought by foreigners having exterritorial rights against foreigners who do not enjoy such rights. As to undisposed-of cases on the hearing list of the Mixed Court at the date of rendition, foreign lawyers whose names appeared on the record are to be permitted to continue in these cases in the Provisional Court during a limited time.

LAW AND PROCEDURE IN THE PROVISIONAL COURT

The Provisional Court is directed to apply "all laws, including laws of procedure, and ordinances applicable at the present time in other Chinese courts, as well as those that may be duly enacted and promulgated in the future." The new codes which have been promulgated in recent years are therefore applicable. These include the Provisional Criminal Code pro-

[52] These rules are published in MacMurray, Treaties and Agreements with and concerning China, 1894–1919, I, p. 338. See also Kotenev, I, p. 114.

[53] See the chapter entitled "The International Bar," Kotenev, I, pp. 202–212. On December 27, 1913, the Ministry of Justice at Peking issued Provisional Rules governing the Commission for the Disciplinary Punishment of Lawyers. See Kotenev, II, p. 498.

[54] On December 24, 1920, special rules were issued by the Ministry of Justice at Peking, governing the appearance in court of lawyers of non-extraterritorial Powers. Kotenev, II, p. 503.

mulgated in 1912, and supplemented in 1914 by the Provisional Criminal Code Amendment Act; the Criminal Procedure Regulations, promulgated in 1922; the Civil Procedure Regulations, also promulgated in 1922; the very important Rules (of private international law) for Application of Foreign Laws, promulgated in 1921; and various special commercial laws, promulgated during the past few years.[55] It is important in this connection that the Supreme Court at Peking has declared that "civil cases are decided first according to express provisions of law; in the absence of express provisions, then according to custom; and in the absence of custom, then according to legal principles."[56] This declaration enables Chinese courts, and therefore the Provisional Court, to treat as sources of legal principles some of the formulations of the Law Codification Commission which have not been officially promulgated.

Some question may arise in the future concerning the enforcement of the Land Regulations and By-Laws of the International Settlement in the Provisional Court. These can hardly be said to be applicable in other Chinese courts, and yet the provisional agreement seems to envisage their application in the Provisional Court by providing (Article 1, section 3) that a senior consul's deputy may sit in certain criminal cases "including contraventions of the Land Regulations and By-Laws of the International Settlement." The Land Regulations of 1869, which as amended in 1898 are now in force, were not adopted in accordance with the procedure of amendment prescribed in the previous Land Regulations of 1854, and they were not at the time approved by the Chinese authorities. In 1898 the Viceroy disinterested himself in them, saying through the Taotai that they were "a matter that should be satisfactorily arranged between the Municipal Council and the Consular Body."[57] In 1899, however, the Taotai proclaimed them to be in force in the extended International Settlement.[58] In support of their enforcement in the Provisional Court, it may therefore be argued that in addition to the long acquiescence by higher Chinese officials, the Land Regulations had the approval of the local Taotai.[59]

[55] See a list of these laws in the Report of the Commission on Extraterritoriality in China, pp. 45–47. See also, George W. Keeton, "The New Chinese Codes," 8 Journal of Comparative Legislation and International Law (3d ser.), p. 225.

[56] For an illuminating comment on this formula, by Judge John C. Wu and others, see 2 China Law Review, p. 209.

[57] Shanghai Municipal Council, Annual Report, 1898, p. 273. On the history of the Land Regulations, see the Mixed Court's judgment in Municipal Council *v.* Sinnekev, *ibid.*, 1917, p. 135A; and *ibid.*, 1917, p. 120A.

[58] *Ibid.*, 1899, p. 262.

[59] Originally, it was doubted whether foreigners were bound by the Land Regulations. The British Supreme Court held that they were binding in the famous Wills case in 1865. See the Shanghai Municipal Council's Annual Report, 1866 (no paging). The local French consular court gave judgment to the same effect soon afterward. See *ibid.* And a somewhat similar judgment was given by the American consular court in Municipal Council *v.* Reid. *Ibid.*, 1881, p. 20. See also 2 Moore, Digest of International Law, p. 648.

The provisional agreement (Article 1, section 2) requires the Provisional Court to take due account of "such established rules of procedure of the Mixed Court as shall be hereafter agreed upon," and the Joint Legal Commission was entrusted with the task of reaching such agreement. The understanding does not expressly establish the rules which had been reprinted in 1925 and had never received the formal assent of the Consular Body; but it refers to the rules "embodied in a printed booklet published by the court" with certain unincorporated amendments, as governing the essentials of the "present procedure," and it was agreed that only such alterations should be made in them as were necessitated by the rendition agreement. Any general revision is "left to a later date when it will have become clearer in what direction adjustment is necessary." Some amendments and additions were made, however, relating chiefly to the publicity of all trials, and to the procedure to be followed in cases appealed to the newly created court of appeals.

THE RECORD OF THE PROVISIONAL COURT

On January 4, 1927, the Consular Body was notified that thirteen judges of the new court had been named by the Kiangsu Provincial Government, and since that date five additional judges have been appointed. The present personnel (May 1, 1927) would seem to be satisfactory, both from the Chinese and the foreign points of view. The first President, or Director as he is sometimes called, received part of his legal training in America and has had a long and varied judicial experience in China. Of the six judges who sit in the Court of Appeal, one was trained in America, one in England and one in Japan; five have had long judicial experience and the sixth was formerly a leader at the Shanghai bar. Of the five judges of first instance, four were trained in America or Japan, and three have had previous judicial experience. Of the six assistant or expectant judges, five have had previous judicial experience and the sixth had an American training. Of a total of eighteen members of the Provisional Court, therefore, fourteen have had previous judicial experience, and nine were educated in foreign countries. Perhaps the beginning thus made is better than can long be maintained.

Since the first meeting of the Provisional Court on January 4, 1927, it has encountered numerous difficulties. Political conditions in China have been such that even a long established tribunal could not have escaped feeling the effect of them. The new court has had to establish itself during a period in which the Kiangsu Provincial Government has passed through a successful revolution, and in which an abnormal situation has prevailed inside the International Settlement owing to the threats to its security and the presence of large numbers of foreign troops. A more inauspicious time for a judicial experiment could hardly be imagined; and it is to the credit of the court that its work has proceeded uninterruptedly, with relatively short delays in hearing cases.

In addition to its other difficulties, some questions have arisen upon which different views have been held by the officials of the court and those representing the Consular Body. The fact that they had to be handled by persons other than those who negotiated the provisional agreement, has not facilitated their solution, and temporary deadlocks have added to the inevitable delays in the court's functioning. One of the first questions to arise related to the seating of the consular officials and senior consul's deputies with reference to the seats occupied by the judges on the bench. The Chinese officials desired to emphasize the change in the court's status to the large court-room public and to indicate the subordination of the officials and deputies, by inferior placing; but the insistent opposition of the Consular Body prevailed. A question arose also as to the papers to be placed before a consular official or senior consul's deputy engaged in a hearing; the assessor in the Mixed Court had a "judgment sheet" before him, but it was agreed that under the new régime the official or deputy sitting in a mixed case should have only a sheet giving the number of the case under trial, the names of the parties, and a heading "translation of order or judgment." This reverts to an earlier practise in the Mixed Court when the rôle of the assessor was confined to a translation. The Chinese did not meet the desire of the officials and deputies to be furnished with copies of the records of proceedings made by the Chinese recorder.

Difference arose also with reference to the payment of fees by foreign nationals. The Joint Legal Commission recommended that "court fees be paid in future by all parties irrespective of their nationality." In the days of the Mixed Court, the nationals of Powers enjoying exterritoriality paid no fees to the court, and in the case of Americans no fees were paid to the consulate. During the period of transition, the officials of the Provisional Court agreed that exterritorial foreigners would not be required to pay fees prior to March 31, 1927; but on that date the Consular Body had not yet agreed that such fees were to be paid in the future, and the formal waiver of immunity has not yet (May 1, 1927) been made. The scale of fees is not altogether that of ordinary Chinese courts, and consists partly of charges for special papers which must be used.[60] The understanding seems to be that future increases must not be made which will discriminate against foreigners.

In the days of the Mixed Court, a practise grew up of expelling Chinese from the Settlement as a punishment for crime, and of imposing penalties for a violation of an expulsion order. The Provisional Court early decided to discontinue the practise of expulsion, saying that it had no power to banish a Chinese from one part of Chinese territory to another. It was also reluctant to impose any penalties for the return to the Settlement of those Chinese

[60] See Kotenev, II, p. 481. The writer was informed by a judge of the court that prior to May 1, 1927, foreigners paid no fees, but that the court was at the expense of paying the carriage hire of officials and deputies in attendance.

who had been expelled by order of the Mixed Court. But the Consular Body has insisted that the continuing validity of past judgments of the Mixed Court, agreed upon at the time of the rendition, included the continuing operation of Mixed Court orders of expulsion. The problem has been aggravated by the disturbed conditions in China which led many Chinese to seek refuge in the Settlement.

Difficulty has arisen also over a difference of views with reference to the participation of consular officials and senior consul's deputies in interim stages of proceedings in cases in which they are to take part in the final trial. In numerous cases, the judges have felt it necessary to pass on preliminary motions and *ex parte* applications without waiting for the presence of an official or a deputy; but this practise obviously curtails the later participation of such officials or deputies and is opposed by them. The precedents have not yet clearly established any rule. In a few cases, the nationals of exterritorial Powers have waived the right to insist on the presence of a consular official, and the judges have deemed themselves competent to proceed with the trial. The Consular Body seems to have challenged this practise, though the provisional agreement does not so clearly limit the jurisdiction of the court as to preclude it.

In spite of its difficulties, the Provisional Court seems to be passing through the initial period with some measure of success. Civil cases, especially mixed civil cases, have been much delayed, but in March, 1927, the court dealt with about 5,300 criminal cases.[61] The political strain of the time has not lessened its burden nor increased its popularity. It has been attacked from two sides. On the one hand, the terms of the rendition have been denounced by some of the Chinese on the ground that "the foreigners are still in possession of all the rights they had already acquired while in control" of the Mixed Court.[62] On the other hand, extremists among the local foreigners, eagerly seeking for vindication of their forebodings about any policy of conciliation, have found their fears justified by the record of the court. One writer is "certain that the entire foreign population of this Settlement is now convinced that the return of the Mixed Court to Chinese control was a fatal error, almost a crime against the peace of Shanghai."[63] And an intransigent local newspaper would have put the "clownish Provisional Court outside the barbed wire."[64] But such views do not express the sober opinion of most of the members of the bars of Shanghai, and such definite judgments of the new court are premature.

THE *COUR MIXTE FRANÇAISE*

A separate mixed court was established in the French Concession in 1869, but it has tended to follow very closely the changes made from time to time

[61] Shanghai Municipal Gazette, April 22, 1927, p. 153.

[62] A Kuomintang manifesto of January 1, 1927, quoted in Kotenev, II, p. 188.

[63] Mr. Rodney Gilbert, in the North China Daily News, April 15, 1927.

[64] The North China Daily News, April 18, 1927. For a more moderate view of the work

in the courts in the International Settlement. The procedure is governed by a *réglement relatif a la Cour Mixte* of May 9, 1921, modified by a *réglement* promulgated by the French Consul-General on July 18, 1924. A *Cour d'Appel* was established in the French Concession by an *ordonnance consulaire* of April 2, 1924. The volume of business in the *Cour Mixte* is by no means as large as it was in the International Mixed Court. It serves a much smaller population; but in 1925, it handled 5,272 criminal cases. The two Chinese judges are assisted by three French assessors.

In recent years Chinese opinion has not been as hostile toward the French Concession as it has been toward the International Settlement, and for this reason there has not been a similar demand for the rendition of the former's mixed court. The *Cour Mixte* began to deal with purely Chinese civil cases soon after such jurisdiction was assumed by the International Mixed Court; and the rendition of the latter influenced a retirement of the French assessors from such cases. By an *ordre de service relatif aux régles speciales des affaires civiles Chinoises* of December 30, 1926, the French Consul-General grouped civil affairs (1) between Chinese, (2) between nationals of Powers not enjoying exterritoriality, and (3) between Chinese and nationals of Powers not enjoying exterritoriality, as "*affaires civiles chinoises*" in which the Chinese magistrate is to sit alone. A special register is now kept for these cases, and *requetes* are drafted only in the Chinese language. Moreover, only Chinese lawyers may appear in such cases.

THE FUTURE OF THE PROVISIONAL COURT

The agreement of August 31, 1926, is to continue in force for three years from January 1, 1927; but during this period a "final settlement" may be negotiated at Peking to replace it. Otherwise the agreement is to continue in force for six years from January 1, 1927. Modification may be proposed at the end of the first three-year period, either by the Kiangsu Provincial Government according to the terms of the agreement, or by the senior consul according to the terms of the later understanding. The agreement is therefore called *provisional*, and the new court is named *provisional*. But China is a country where things provisional sometimes have a long life. In 1869 the Land Regulations of the International Settlement were *provisionally* agreed to by the diplomatic representatives at Peking, but in amended form they are still in force. In that year also, the Court of Foreign Consuls was established *provisionally*, but it still exists; and the Rules of the Mixed Court were *provisionally* agreed to, but they continued in force until 1927. About the same time, the *réglement* of the French Concession, only recently abrogated, was *provisionally* agreed to by the diplomatic representatives at Peking. In 1902 the rules defining the respective jurisdictions of the mixed courts in the International Settlement and the French Concession were

of the court during the first four months, see Samuel H. Chang, "The Chinese Side of the Court Issue," China Weekly Review, April 30, 1927.

provisionally established, but they are still in force. The Chinese Criminal Code of 1912 is called *provisional*, but it is still in force. On the basis of these precedents, the Shanghai Provisional Court may have a long career before it. Its future probably depends as much on the course of political events in China as on its own success.

It is really the future of the International Settlement that will determine the future of the Provisional Court. If the several districts should be reorganized to meet the needs of Greater Shanghai, if the Settlement and the French Concession should be united with various Chinese areas under a special kind of municipal government in which foreigners coöperate with the Chinese, then a special tribunal is needed, in which it would seem that foreign judges would be preferable to consular officers and deputies. If the Chinese would agree to employing some foreign judges, the Powers might well agree to abrogating much of the consular jurisdiction in this cosmopolitan community. But if no extensive reorganization is attempted, the system of Chinese administration with consular assistance must be developed until changes are made in the régime of exterritoriality itself. That system will always produce difficulties, so long as the police in the Settlement are under the sole control of the Municipal Council. Any attempt to undo the rendition which has been effected would be unfortunate; and improvement of the situation by immediate revision of the provisional agreement seems improbable. The "final settlement" of the court problem at Shanghai must await the establishment of a local government to which the Chinese will not be hostile.

Meanwhile, the needs of the community will be somewhat adequately served by the Provisional Court only if the Chinese and consular authorities are determined that differences on details shall not stand in the way of their coöperation. The history of the Mixed Court during the past fifteen years has abundantly demonstrated the desirability of Chinese control of public institutions in China, and of the foreigners' seeking protection of their interests through the Chinese themselves.

THE MIXED CLAIMS COMMISSION AND GERMAN PROPERTY IN THE UNITED STATES OF AMERICA

By Arthur Burchard
Member of the Bar of Berlin

The United States of America, having refused to ratify the peace treaty negotiated at Paris in 1919 between the Allied and Associated Powers, on the one hand, and Germany on the other hand, commonly called the Treaty of Versailles, has, nevertheless, reserved to itself all the rights arising from the said treaty in the separate treaty of peace which was concluded between the United States of America and Germany on August 25, 1921, and ratified at Berlin on November 11, 1921, the treaty having been promulgated by the President of the United States on November 14, 1921. The clause containing the said reservation of rights reads that

> Germany undertakes to accord to the United States and the United States shall have and fully enjoy all the rights, privileges, indemnities, reparations or advantages specified in the Joint Resolution of Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles, notwithstanding the fact that such treaty has not been ratified by the United States, [and] the rights and advantages stipulated . . . are those defined in Part X. . . .

The Part X of the Treaty of Versailles referred to deals, in the main, with questions involving private law and affecting private property. In order to convert war-time conditions, as regards private property, into peace-time conditions, it deals comprehensively as to the way private property should be treated after the peace treaty has become operative. While taking as its basic principle the principle of "restitution," which includes the reëstablishment of the status in regard to such property obtaining before the war, detailed provisions for attaining such object are set forth. Among such provisions is that contained in Article 297 (e), providing for compensation to be paid by Germany to the nationals of Allied or Associated Powers in respect to damage or injury inflicted upon their property, rights or interests, in German territory as it existed on August 1, 1914, as a result of the application of the so-called exceptional war measures or measures of transfer. The legal recognition of those measures is an innovation of the treaty, and they are therein defined in paragraphs 1 and 3 of the Annex to Articles 297–298. Any claim raised on such grounds is to be determined by the Mixed Arbitral Tribunals which are to be established under the provisions of the same treaty.

This provision has been relied upon to obtain indemnification for the losses arising from the depreciation of German currency. In order to pro-

vide a means to effect "restitution" in the aforementioned sense, the treaty provides that all exceptional war measures and measures of transfer taken by Germany with respect to the property, rights and interests of nationals of the Allied or Associated Powers, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned be restored to their owners, who shall enjoy full rights therein in accordance with the particular provisions contained in Article 298 (see Article 297 (a)). The said provisions of the treaty do not refer to or include any damage sustained by property thus restored or freed from seizure by the German Government. If the losses resulting from the depreciation of German currency may be construed as damage suffered by property so taken, then the only provision of the treaty which can be taken to grant redress for such damage is the above-mentioned Article 297 (e). As far as German municipal law is concerned, the mark was considered as legal tender, irrespective of its intrinsic value, and no remedy was available, under its provisions, for the losses sustained by the shrinkage in value of the mark, unless some act of the opposing party contributed to such damage, such as failure to make payment after an account was due and payable, in accordance with the respective provisions of German law.

As the treaty is an international agreement, it belongs, therefore, to the province of international law, but it is binding upon the parties to it only, and not upon all the members of the community of nations. Claims to be based upon either international or national law against a government of an independent state, according to the accepted principles of international law, cannot be prosecuted in any national court without its consent. As far as international courts are concerned, no international court can entertain any such claim unless the government concerned has agreed to submit such claim to the decision of such tribunal.

The claim under Article 297 (e) of the Treaty of Versailles, according to its words, is a claim against the German Government only, not against any private party. Also the decisions of the different Mixed Arbitral Tribunals, set up under the provisions of the said treaty, agree on this point. Any claim to be derived from the depreciation of German currency may be raised, therefore, against the German Government, to the extent the provisions contained in Article 297 (e) permit, but not against any private person, and only an international court to the jurisdiction of which the German Government has consented, can exercise such jurisdiction in deciding such claims. Such court is expressly provided for in Article 297 (e), and the jurisdiction of the said court must be considered as exclusive. Claims of the said nature may be brought solely before the said court unless the treaty establishes a different rule for any specific case. The courts so to be set up are the Mixed Arbitral Tribunals, which, according to Article 304 (a), shall be established between each of the Allied and Associated Powers, on the one hand, and Germany, on the other hand. This article calls for their establishment within

three months from the effective date of the treaty between Germany and the Allied or Associated Power concerned. Section VI of Part X of the treaty, with the heading "Mixed Arbitral Tribunals," treats in detail of their organization, jurisdiction, and procedure.

Not having become a party to the Versailles Treaty, the United States has not been obliged to establish such a tribunal, and neither has it exercised its right to establish a Mixed Arbitral Tribunal between itself and Germany to which it was entitled by having reserved to itself in the separate treaty of peace with Germany all the rights arising from the Treaty of Versailles. By virtue of a special agreement in the form of a treaty, dated August 10, 1922, the United States and Germany have established a mixed commission, commonly called the "Mixed Claims Commission," which in its powers and authority is designed to constitute to some extent a Special International Court. Its jurisdiction, powers and authority, defined in the agreement creating it, are to determine the amounts due by the German Government on the classes of obligations described below:

> (1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;
>
> (2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;
>
> (3) Debts owing to American citizens by the German Government or by German nationals.

Such claims for property as, for instance, those arising upon accounts and based upon German law, *e.g.*, the balance due from an account in German marks, are covered by the third subdivision. The claim for compensation for the depreciation of the currency, based upon Article 297 (e), might be among those comprehended by subdivision two. In this connection, it should be remarked that the competence and jurisdiction of the Mixed Claims Commission is extended beyond that of the Mixed Arbitral Tribunals.

As to the latter, the Franco-German Tribunal, in the decision in the matter of Société Vinicole de Champagne *v.* H. and W. de Mumm, of March 4, 1921, Rec. I, p. 22, has, notwithstanding the distinct provisions in the treaty establishing and limiting the competence of the Mixed Arbitral Tribunals to certain cases or classes of cases, attempted to extend its authority in a general way to the decision of all matters contained in Sections III, IV, V, VI and VII of Part X of the treaty and to escape its restriction to such cases as are assigned expressly to the competence of the tribunals in said sections. It has justified this action upon the ground that the tribunal is the sole judge of its competence and jurisdiction. This means, that although the tribunal is only to

be constituted under the treaty and on the basis of its provisions, which is the only source of its powers, and although it has no standing in law, national or international, outside the treaty, it does not hold itself bound to the express provisions of the treaty in determining its own competence. After having once sprung into existence by the treaty, it asserts its independence and seeks to extend its jurisdiction as far as it believes it ought to be extended, and not as far as the treaty actually grants jurisdiction. Since it is an independent tribunal and not subordinate to any other court, it expects its decisions to be respected everywhere, even upon matters which the treaty, by its terms, does not expressly include within the scope of its authority. This conclusion has no foundation in any provision of the treaty, but the treaty, when providing for the establishment of such tribunals in Section VI (Article 304 (b)), expressly limits their jurisdiction and competence to the decision of "all questions *within their competence* under Sections III, IV, V and VII." It extends competence in a general way only in regard to certain cases in a second paragraph which reads:

> In addition, all questions whatsoever their nature, relating to contracts concluded before the coming into force of the present treaty between nationals of the Allied and Associated Powers and German nationals shall be decided by the Mixed Arbitral Tribunal, always excepting questions which, under the laws of the Allied, Associated or Neutral Powers, are within the jurisdiction of the national courts of those Powers. Such questions shall be decided by the national courts in question, to the exclusion of the Mixed Arbitral Tribunal. The party who is a national of an Allied or Associated Power, may nevertheless bring the case before the Mixed Arbitral Tribunal if this is not prohibited by the laws of his country.

The provisions in the sections enumerated in the foregoing quotation, conferring jurisdiction upon the Mixed Arbitral Tribunal in a distinct way for certain cases or classes of cases, are the provisions contained in Annex §§16 to 21, 23, 24 to Article 296, Article 297 (e), par. 2 of h 2, Article 299 (b), par. 2, Article 300 (b), (e), (d), (f), Article 302, par. 2, 3, 4, Article 305, Article 310, par. 1. Outside of the said provisions, the Mixed Arbitral Tribunals are not even mentioned in the treaty, and in view of the distinct language of the treaty as to their competence, they cannot be considered as international tribunals of general jurisdiction themselves authorized to decide the extent of their jurisdiction. They are but special international tribunals, having special jurisdiction in special cases which cannot be extended beyond that actually provided by the instrument creating them.

The Franco-German Mixed Arbitral Tribunal has in later decisions receded to some extent from the logically untenable position maintained by it in the Mumm case. If there had been established such a tribunal between the United States and Germany, it would have been competent to decide upon the claim discussed above for compensation under Article 297 (e), while, for the other part of the claim, *i.e.*, for the balance of the account,

payable in German marks, the American courts, to the exclusion of the German courts and the Mixed Arbitral Tribunal, would have been exclusively competent, on the ground of Article 304 (b), par. 2, quoted above.

The United States has not, however, ratified the treaty, but has reserved to itself all rights, privileges and advantages under it. Instead of establishing a Mixed Arbitral Tribunal, which, under the treaty (Article 304 (a)) was to have been established within three months of its coming into force, it has established by virtue of the special agreement with Germany, a special court, not mentioned in the treaty, called a "Claims Commission," with jurisdiction and competence other than that provided for in the treaty. The purpose and nature of its decisions, moreover, differ from those of the Mixed Arbitral Tribunals.

Regarding the decisions of the Mixed Arbitral Tribunals under the treaty, Article 304 (g), provides that "The high Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals." The Mixed Arbitral Tribunal is intended to be a real court, proceeds like a court, gives its decisions like a court, for the purpose of their being brought to execution, and has its decisions brought to execution by the governments involved by so ordering.

The purpose of the Claims Commission, on the other hand, is, as the agreement establishing it states, merely to produce decisions for the purpose of determining the amount of indebtedness on the part of the German Government in regard to certain claims. After decisions have been rendered, it will be left entirely to the two governments to determine between themselves what use they are going to make of the decisions. There is no means provided for the enforcement of the commission's decisions. The procedure differs from that before a Mixed Arbitral Tribunal and resembles court procedure in a limited degree only. It may be pointed out in this respect, that the rules of procedure before the Mixed Claims Commission call for oral evidence only in exceptional cases for good cause shown (Rules of the Mixed Claims Commission, V), whereas the Mixed Arbitral Tribunal decides all questions and matters submitted upon such evidence and information in any form furnished by the parties concerned (§6 Annex to Article 304), with the exception of cases between opposing Clearing Offices, where the decisions will be arrived at on documentary evidence (§18 Annex to Article 296). It is left to the discretion of the Mixed Claims Commission to hear oral arguments, and to limit these (Rules VI); and as to the procedure, provision is made for a certain order for filing briefs and proofs by the agents of the two governments concerned, with the privilege to the American agent, but not to the German agent, to open each case again (Rule VI). Before the Mixed Arbitral Tribunal any agent and counsel of the parties on either side is authorized to present orally and in writing to the tribunal arguments in support or in defence of each case (§3 Annex to Article 304). The proceedings before the Mixed Arbitral Tribunal are sometimes proceedings between

governments, *e.g.*, between Clearing Offices (§16 Annex to Article 296) and sometimes between private parties, *e.g.*, in cases for determining the conditions of licenses (Article 310), and sometimes between governments and private parties, *e.g.*, in all cases arising under Article 297 (e).

The proceedings before the Mixed Claims Commission are proceedings between the two governments concerned, particularly since Germany, by virtue of the statement of its agent on May 15, 1923, assumed the direct liability as principal debtor for all claims to be raised under the agreement. In the proceedings before the Mixed Arbitral Tribunal, disputes between Clearing Offices may be referred to the Mixed Arbitral Tribunal (§16 Annex to Article 296) at any time, and where a certain period of time is set for presenting cases, then, mostly, a Mixed Arbitral Tribunal may give leave for later presentation.

By an exchange of notes on August 10, 1922, between the United States and Germany, the two governments agreed to limit the time for presenting claims to the Mixed Claims Commission to six months after its first meeting, which occurred on October 9, 1922, thereby limiting the operation of the Mixed Claims Commission to claims presented within a definite period. When a time limit has been set for presenting claims to the Mixed Arbitral Tribunal, the limit has been sometimes extended, as in the case of the Franco-German Tribunal, where, by the rules of procedure, a time limit was set for presenting claims arising under Article 299 (b), par. 2, and this limit, at the instance of the German Government and in favor of the German nationals, through mutual agreement between the French and German Governments, was extended. (Publication in the German *Reichsgesetzblatt*, 1920, p. 525.) In the case of a refusal by a Clearing Office to notify the opposing Clearing Office of a claim, thus preventing the claim from eventually being brought before the Mixed Arbitral Tribunal, an enemy creditor is "entitled to receive from the Clearing Office a certificate setting out the amount of the claim," and is then "entitled to prosecute the claim before the courts or to take such other proceedings as may be open to him" (§25 Annex to Article 296). An American creditor whose claim the American agent has refused to present to the commission for any reason whatsoever, has absolutely no remedy at all against such refusal. In case the commission should be considered as having exclusive jurisdiction within the limits of its competence and excluding any court from entertaining such claims, the American citizen might in such a case be deprived of his property, in violation of Amendment V to the Constitution of the United States.

The foregoing instances sufficiently prove that the Mixed Claims Commission has not the same functions as are bestowed by the treaty upon the Mixed Arbitral Tribunals. It is actually what its name indicates, a commission only, a body for diplomatic purposes, with a quasi-judicial character, but not a true court, with judicial powers, which is the essential character of any Mixed Arbitral Tribunal created by treaty.

By virtue of Article III, Section II, of the American Constitution, the judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made under their authority. Furthermore, any right arising under the Constitution or the laws cannot be taken away from any person enjoying the protection of the Constitution without violation of Amendment V. In case the Mixed Claims Commission established by the agreement of August 10, 1922, although not being a real or recognized court, should be considered to have obtained exclusive jurisdiction over certain claims, to the exclusion of the regular courts, it would mean that in such cases judicial power would be abolished and that American citizens would be deprived of rights. Any government may, to be sure, by law or treaty effect a change in the judicial organization of its courts within the constitutional limits and substitute new courts for existing courts; but this power does not extend to the substitution of tribunals, national or international, with only quasi-judicial character, for the judiciary contemplated by the Constitution.

For this reason the creation of the Mixed Claims Commission cannot result in the impairment of the judicial powers or the jurisdictional rights of the regular courts of the United States in cases in which they were competent prior to its establishment, whether they arose before, during or subsequent thereto. With or without the existence of a Mixed Arbitral Tribunal, by Article 304 (b), the American citizen has the right to bring all questions relating to contracts concluded before the treaty between Allied and Associated nationals and German nationals into his national courts, to the exclusion of any other court, inasmuch as such questions, under the American laws, are within the jurisdiction of the American courts. This jurisdiction was established by Article 9 of the Trading with the Enemy Act of October 6, 1917, as amended by the Act of June 5, 1920. Any suit, raised under these provisions, before an American court, must remain there, notwithstanding the establishment of the Mixed Claims Commission, and judgment must be rendered therein by the courts that have had original and appellate jurisdiction, respectively, according to the organization of the judiciary.

The provisions contained in Article 9 of the Trading with the Enemy Act, as amended by Act of June 5, 1920, were reënacted on March 4, 1923, by the so-called Winslow Bill, and the power of any court to deal with all questions within the scope of Article 9 was reaffirmed thereby, even as against the provisions of any intermediary treaty which might seem to impair such powers. As explained above, the agreement of August 25, 1921, is not to be considered a treaty with such intent, and the Article,

> Any claimant may (under certain conditions) institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, . . . to establish the interest, right, title or debt so claimed, and if so established, the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other

> property (of the defendant) so held by the Alien Property Custodian, or by the Treasurer of the United States or of the interest therein to which the court shall determine said claimant is entitled,

is so unequivocal as to leave no doubt as to the continued and unimpaired competence and jurisdiction of the courts mentioned therein.

The Mixed Claims Commission, by virtue of the provisions of the agreement creating it, is not restricted to the limited jurisdiction of the Mixed Arbitral Tribunal established under the provisions of the treaty. In a case both for payment of an amount due on an account, and for damage sustained by deterioration of currency, it would be in a position to render a decision for the whole amount due, and not for such part of it as would be recoverable under the authority of Article 297 (e), and within the competence of the Mixed Arbitral Tribunal to decide. Irrespective of any proceedings instituted by the American Government before the Mixed Claims Commission and purporting to obtain a certain end only, court proceedings may take place on behalf of the party concerned without consideration of the existence of the Mixed Claims Commission; and of the two proceedings those instituted before the court are the only ones apt to produce a judgment which may be brought to satisfaction under the laws of the land.

This opens the question as to the way in which the compensation, recoverable by virtue of Article 297 (e), and regarding which the regular courts have no jurisdiction, may be realized and brought to satisfaction. Since the Mixed Claims Commission does not take the place of a Mixed Arbitral Tribunal, the American party claiming such compensation is practically at the mercy of the government, no agency to which he has access being possessed with power and authority to decide such a claim. Although reserving to itself all the rights and privileges under the treaty, the American Government, by omitting to establish a Mixed Arbitral Tribunal with Germany, has for all practical purposes deprived its citizens of the only means of enforcing many such claims which are within the exclusive competence of the Mixed Arbitral Tribunal, and has, therefore, taken upon itself the burden of satisfying such claims. Whether the American Government is entitled so to proceed is a constitutional question for decision. From a legal standpoint, no direct way to enforce such a claim, based upon Article 297 (e), is open to an American citizen, except through the agency of his government.

As to such part of a claim as it is within the jurisdiction of an American court to pass upon, as, for example, the amount of the balance of an account due from a German national, the treaty grants to any Allied or Associated Power, by §4 of the Annex to Articles 297–8, the power to utilize such property of German nationals, or the proceeds thereof, as may have been retained or liquidated under the provisions of Article 297 (b), for the purpose of satisfying debts owing to their nationals from German nationals. Since merely the power and authority is granted, and no duty to exercise such power is imposed in the treaty, it is for the national legislation in each

country to determine whether and to what extent and in what manner such power may be exercised. American legislation in this respect has, outside of claims to specific property or against owners of property seized, ordered the retention of the German property seized in America, but has not thus far made it available generally for the satisfaction of debts. It will, therefore, depend upon the legislation eventually to be enacted to determine how and to what extent the German property so retained will be made available for the satisfaction of any other judgment. This will affect judgments rendered by the courts, as well as decisions pronounced by the Mixed Claims Commission. On the other hand, in so far as property is retained belonging to the debtor of an American citizen, the court, when entering a final judgment in favor of the claimant, is to order the satisfaction of such judgment out of the property retained. This does not, however, relate to the claim for compensation for depreciation of the mark. To that extent, it will depend entirely upon the legislation of Congress what power of enforcement it will give to any such decision rendered by the Mixed Claims Commission.

DOMINION STATUS IN INTERNATIONAL LAW

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At the Imperial Conference of 1926, the participating British governments agreed that the Dominions and Great Britain "are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."[1]

The participating governments were those of Great Britain, Canada, Australia, New Zealand, South Africa, Irish Free State, India and Newfoundland. The result of the conference is to create, by the unilateral action of the governments affected, a new political entity in international law. Since Great Britain was and is an independent state, Great Britain, as a result of the conference, has constitutionally recognized the Dominions as being, not only constitutionally, but also internationally, equal to Great Britain, and so, has recognized the Dominions of Canada, Australia, New Zealand, South Africa, Irish Free State, India and Newfoundland as independent states. That is, Great Britain has either recognized the Dominions as independent states or has admitted that Great Britain has become a Dominion. This, however, overlooks one point which may create confusion and difficulty. Great Britain, only in and by itself, has become a Dominion. Great Britain plus the crown colonies would seem to be a political entity more or less distinct from the Great Britain which has become a Dominion. Great Britain minus the crown colonies has become a Dominion, or, if one likes, the Dominions have become equal to Great Britain minus the crown colonies—consequently the British Commonwealth of Nations consists of eight equal political entities.

The possibility of political entities, such as the British Dominions, having a status in international law, may be determined by considering three matters. In the first place, the power of the Dominion Governments to act must be determined, that is, it must be determined whether the Dominion Governments are capable of acting in international relations. In the second place, the responsibility of the Dominion Governments to foreign states for any and all of their acts which affect foreign states must be determined. In the third place, the recognition of the Dominions by foreign states, or the acceptance by foreign states, first, of the power of the Dominion Governments to act, and secondly, of the responsibility of the Dominion Governments for those acts, must be determined.

[1] Command No. 2768, reprinted in Supplement to this Journal, April, 1927, p. 21.

In relations with foreign states, the Dominion Governments presumably have the power to act, since they have been declared equal to the British Government, which admittedly has power to act in international relations. At the Versailles Conference, the Dominion Governments acted by negotiating and signing treaties, and by advising ratification of the treaties there concluded.[2] At the Washington Conference, the Dominion Governments also acted by negotiating and signing treaties, and by advising ratification of treaties there concluded.[3] In both these instances the Dominion Governments acted as parts of a composite but unified British Empire.[4] In 1923, the Canadian Government almost concluded a formal treaty with the United States, if, as the Canadian Government claims, it did not actually do so.[5] At the Imperial Conference of 1923, the Dominion Governments received power to conclude treaties without reference to any other British government where such treaties concerned only their own individual affairs.[6] In 1924, 1925 and 1926 the Canadian Government, through the King on behalf of Canada concluded, not only four treaties with the United States,[7] but also, one with France,[8] one with Italy,[9] one with Belgium,[10] and one with Holland.[11]

The power of the Dominion Governments to act in international relations is also evidenced by their power to have diplomatic representation abroad.[12] The Canadian Government received the power by agreement with the British Government in 1920. In 1924, the Irish Free State appointed a Minister Plenipotentiary to Washington. In 1926, Canada followed suit.

Consequently, it must be concluded that the Dominion Governments have and exercise the power to act in international relations.

In relations with foreign states, the Dominion Governments presumably bear the responsibility for any acts which the Crown may take on their behalf. The Crown is the formal chief executive of every Dominion Government. The Crown acts and will act in a matter of concern to any individual Dominion, only on the advice of the Dominion Government concerned.[13] In doing so, the Crown limits itself formally "on behalf of" or "in respect of" the particular Dominion Government which is tendering the advice.[14] A Dominion Government formally acts only through the King, who repre-

[2] Borden, Canadian Constitutional Studies, p. 119.
[3] Canada, Sessional Paper, 1922, No. 47, p. 43.
[4] Canada, Sessional Paper, 1922, No. 47, p. 44, sec. 110.
[5] Canada, Sessional Paper, 1923, No. 111A, pp. 11–14.
[6] Command, 1923, No. 1987, p. 14.
[7] U. S. Treaty Series, Nos. 718, 719, 720, 721.
[8] 13–14 George V, Canada, Cap. 14.
[9] 13–14 George V, Canada, Cap. 17.
[10] 14–15 George V, Canada, Cap. 9.
[11] 15–16 George V, Canada, Cap. 19.
[12] Debates, House of Commons, Canada, 1920, Vol. 3, p. 2178.
[13] See statement by Sir Cecil Hurst, cited 24 Mich. Law Rev., p. 267.
[14] As *e.g.*, in Can. Sess. Paper, 1925, No. 99 (Boundary Demarcation Treaty).

ents the Crown. The King acts "on behalf of" a particular Dominion Government only when so advised by that Dominion Government. If responsibility or accountability for any act is to be enforced by a third state, that responsibility or accountability will be enforced by diplomatic, arbitral or judicial means against the Crown which is a part of the Dominion Government concerned. Since the Crown can act only on the advice of that Dominion Government, necessarily the Dominion Government which is concerned will have to bear the responsibility or liability for the act or dereliction of duty, which is sought to be enforced against that Dominion's chief executive.

The responsibility of the Dominion Governments to foreign states is thus a fact, but the machinery whereby that responsibility can be brought home is of importance, in that it demonstrates the methods used in ensuring that responsibility for actions taken will be enforced against the acting government. The Crown in form carries on all international intercourse of the Dominion Governments. Only His Britannic Majesty is known formally to foreign governments. The Crown has its diplomatic corps in the various capitals of the world and the Crown on behalf of Canada and of the Irish Free State has its diplomats in Washington. The enforcement of responsibility against Dominion Governments can most clearly be seen by two or three examples. Under the Washington Treaties on Disarmament, the Dominions are jointly responsible for maintenance of the British ratio of five. In case of breach by the Australian (or any other Dominion) Government, complaint by the United States would be delivered to the British Ambassador in Washington since this is a matter of group concern. The British Ambassador would forward the complaint to the British Foreign Secretary. The British Foreign Secretary as central agent of the group would transmit the complaint to all the Dominion Governments. Arrangement of the difficulty, by the Australian Government with the other Dominion Governments, through negotiation or through the Imperial Conference, would then be made. The final step would be transmission of the reply through the United States Ambassador in London to the United States Government. On the other hand, if complaint were to be made by the United States against Canada for breach of a bilateral treaty made between the King on behalf of Canada and the United States, the complaint would be delivered to the Canadian Minister Plenipotentiary. The Canadian Minister Plenipotentiary, acting for the Crown on behalf of Canada, would send the complaint to the Governor General, that is, to the Government in Ottawa, not the Government in London, and the Governor General, acting on the advice of the Government of Canada, would meet the difficulty in the appropriate manner.[15] The Governor General would then reply to the complaint, either through the Canadian Minister Plenipotentiary in Washington or

[15] See Correspondence *re* Chicago Water Diversion, tabled, Canadian House of Commons, 30th June, 1926.

through the United States Minister Plenipotentiary in Ottawa. Matter of purely Irish concern are, in the same manner, handled directly through the Irish Minister Plenipotentiary with the Government in Dublin, not with the Government in London. Matters of purely Australian, New Zealand, South African, Indian or Newfoundland concern are handled by the British Ambassador for the Crown on behalf of the Dominion solely concerned, as they have been handled heretofore for Canada.

Consequently, it must be concluded not only that the Dominion Governments are responsible for their international actions, but, also, that the machinery for enforcing and bringing home that responsibility exists, and is in full working order.

The recognition of the Dominions by foreign states, or the acceptance by foreign states, first, of the power of the Dominions to act, and secondly, of the responsibility of the Dominions for those acts, is clearly determined by the actions of the Dominion Governments during the past ten years. In 1920 the League of Nations accepted five Dominions as full legal members. Fifty-six nations now accept the Dominions as equals in all activities of the League of Nations. Since 1923, the United States, which is the chief non-member of the League, has made treaties with one Dominion and has actually received diplomatic envoys from two of them.[16] With all the Dominions as a group the United States made a treaty in 1921, that is the United States, as a result of the Washington Treaty, placed itself in the same position toward the Dominions, as the Allied Powers placed themselves in signing and ratifying the Treaty of Versailles. The fifty-six members of the League of Nations and the United States have tacitly admitted, by their relations with Dominion Governments, that the Dominion Governments have power to act individually and jointly, and that, when they act, they are responsible for their actions either jointly or severally, depending on the method pursued in taking action. The members of the League of Nations and the United States have thus admitted that each Dominion can act as an international person and is individually responsible for such individual action; that the Dominions can act as a group-entity and are jointly responsible for such group actions.

Consequently, it must be admitted that foreign states have recognized and accepted the facts, first, that the Dominions as a group, form an international group-entity under the Crown, and secondly, that each Dominion is an international entity under the Crown on its behalf.

The power of the Dominions to act in international affairs, the responsibility of the Dominions to foreign states for those international acts, and the recognition by foreign states, not only of the power of the Dominions to act, but also of the responsibility of the Dominions for those acts, having been

[16] Sending and receiving diplomats, and making treaties, are accepted means of according tacit recognition. See Hall, Int. Law, 8th ed., p. 108; Oppenheim, 1905, Vol. 1, p. 110; Westlake, International Law, Part I, p. 49.

determined, the Dominions consequently can justly be said to be international persons. There are, however, various classes of international persons. Hall's International Law classifies the persons of international law under two heads—independent states, and states in possession of imperfect independence.

"The marks of an independent state," according to Hall,[17] "are that the community constituting it is permanently established for a political end, that it possesses a defined territory and that it is independent of external control." The Dominions are each admittedly communities, they are each permanently established for a political end, and they are each in possession of a defined territory, and they are each independent of external control. Consequently, it can be concluded that the Dominions are states in international law. Yet through the Imperial Conference and through their historic connection with another person under international law (Great Britain), they form a union which seems to negative the statement that they are independent of external control. By the freely given consent of the Government of Great Britain, which is admittedly a person under international law, the Dominions are legally equals of Great Britain. The union between the Dominions is that of self-willing entities in association under self-imposed rules as enunciated, particularly, by the Imperial Conferences of 1923 and 1926. Thus, although the Dominions are states, yet they are states in such intimate relations with another long-recognized member of the family of nations, that a classification of them as states does not precisely fit the situation. Their capacity for rights, because of their intimate co-relationship, is not entirely that of so-called independent states. Consequently, it must be concluded that the Dominions are not exactly independent states.

Under the head of states in possession of imperfect independence, Hall includes "states joined to others by a personal, real, federal or confederate union and states placed under the protection or suzerainty of others."[18]

"A personal union," according to Hall, "exists when two states, distinct in every respect, are ruled by the same prince, who acts as their common agent for certain purposes, but which are in no way bound by or responsible for each other's acts." The British Dominions have a common agent, not for certain purposes but for all purposes. The King is the formal chief executive of each Dominion Government. In one aspect, the Dominions are bound by or responsible for each other's acts, as, for instance, in the Halibut Fisheries Treaty, or in any case of breach of the Washington Treaties, or in any act which involves two or more of them. It may categorically be stated that, if one Dominion is at war, all Dominions are at war, and consequently that they are bound by or responsible for each other's acts. In another aspect, the Dominions are in no way bound by or responsible for each other's acts, as for instance in the Boundary Demarcation Treaty of

[17] Hall, International Law, 8th ed., p. 17.

[18] Hall, *ibid.*, p. 23.

1925 between His Britannic Majesty in respect of Canada and the United States, and the other recent treaties between Canada and the United States. Consequently, it must be concluded that the Dominions do not form a personal union with the other members of the Commonwealth. In one aspect they do form a personal union; in another and quite as important an aspect, they do not. Hence their status is not that of members of a personal union.

"The distinguishing marks of a federal state upon its international side," according to Hall,[19] "consist in the existence of a central government, to which the conduct of all external relations is confided, and in the absence of any right on the part of the states forming the corporate whole, to separate themselves from it." Whether the Dominions have any right to separate from the corporate whole of the Commonwealth, is hardly debatable. Legally, they have not. Actually and constitutionally they may. But that the Dominions are not members of a federal state undoubtedly appears from the fact that they have no "central government to which the conduct of all external relations is confided." Consequently it must be concluded that the Dominions do not form parts of a federal state.

"A real union," according to Hall,[20] "is indistinguishable for international purposes from a federal union. It occurs when states are indissolubly combined under the same monarch, their identity being merged in that of a common state for external purposes, though each may retain distinct internal laws and institutions." Though the Dominions may be indissolubly combined under the same monarch and have distinct internal laws and institutions, their identity is not merged in that of a common state for external purposes. Consequently it must be concluded that the Dominions are not members of a real union.

"The union which is established between confederated states," according to Hall,[21] "is strictly one of independent states, which consent to forego, permanently, a part of their liberty of action for certain specified objects, and they are not so combined under a common government that the latter appears to their exclusion as the international entity."

The Dominions are, in solely national affairs, independent states. They consent to forego a part of their liberty of action for group objects or purposes, whatever those objects or purposes may be. They are not so combined under a common government that the latter appears to their exclusion as the international entity. Thus it can be concluded that the Dominions are members of a confederate state.

On the other hand, in group affairs, the Dominions are not independent states and never have been independent states. They have consented to forego their liberty of action in a broad and undefined field of action, but not for any specific objects. In short, the Dominions have not granted to any

[19] Hall, International Law, 8th ed., p. 25. [20] Hall, *ibid.*, p. 26.
[21] Hall, *ibid.*, p. 27.

central organ or government the conduct of any specific function of government. The Dominions are for group purposes combined under a King, so that the King appears, to their individual exclusion, as the international entity. Thus it can be concluded that the Dominions are not members of a confederate state.

In one aspect, the Dominions do form a confederation. In another aspect, the Dominions do not form a confederation. The balance tends towards the latter conclusion, for, whereas in a confederation, the central organ is made up of plenipotentiaries from the members, in the British Commonwealth, the central organ, the Imperial Conference, is a Cabinet of Governments; and whereas, in a confederation, the citizens are subjects of their respective states and have no common nationality, in the British Commonwealth citizens are not only subjects of their respective states but also are citizens of the Commonwealth, and they have a common British nationality through their allegiance to the one King. The spirit and intent of the Confederate union is so different from the spirit and intent of the union between the Dominions that the only conclusion possible is that the Dominions do not form a confederation.

"In order that a community may fall within the category of protected states which are persons in international law, it is necessary," according to Hall,[22] "that its subjects shall retain a distinct nationality and that its relations to the protecting state shall be consistent with its neutrality during a war undertaken by the latter; in other words, its members must owe no allegiance except to the community itself and its international liberty must be restrained in those matters only in which the control of the protecting power tends to prevent hostile contact with other states or to secure safety if hostilities arise."

It is clear that the Dominions are not protected states, since their citizens do owe allegiance to a King who is, not only of the community itself, but also of the other communities. Further, the relations of any one Dominion to the other Dominions are not consistent with its neutrality during a war undertaken by the other Dominions. Consequently, it must be concluded that the Dominions are not protected states.

"States under the suzerainty of others," according to Hall,[23] "are portions of the latter which during a process of gradual disruption or by the grace of the sovereign have acquired certain of the powers of an independent community such as that of making commercial conventions or of conferring their exequatur upon foreign consuls." The Dominions have acquired not only certain, but all of the powers of an independent community. Hall continues, "A state under the suzerainty of another, being confessedly a part of another state, has those rights only which have been expressly granted to it and the assumption of larger powers of external action than those which have been distinctly conceded to it is an act of rebellion against the sovereign." Since,

[22] Hall, International Law., 8th ed., p. 28. [23] Hall, *ibid.*, p. 32.

by the resolution of the Conference of 1926, the Dominions are legally the equals of Great Britain, which alone could be their sovereign state, any relation of superior to inferior, which should exist in the case of a state under the suzerainty of another, is distinctly not applicable to the relation between the Dominions, or between the Dominions and Great Britain. Consequently, it must be concluded that the Dominions are not under the suzerainty of Great Britain or any other state.

Hall also considers a class of international persons, such as Cuba, which is classified as a client state.[24] The distinguishing characteristic here would seem to be the right of a neighboring state to intervene in the affairs of the client state. Neither Great Britain nor any other state has the right, by treaty or otherwise, to intervene in the external or internal affairs of any of the Dominions. Consequently it must be concluded that the Dominions are not client states.

The conclusion thus arrived at is, that the Dominions cannot be included in any of the classes of persons known to international law. They do not possess the status of any person known to international law. Yet they are known to international law, for foreign states have recognized and accepted the facts, first that the Dominions as a group form an international group-entity under the Crown, and secondly that each Dominion is or can be an international entity under the Crown on its behalf.

The only possible conclusion is that the Dominions have created a status in international law which differs from the status of any other person or group of persons known to international law.

Status literally means rank or standing but, as rank or standing is a consequence of the possession of the rights, and of the capacity to perform the duties, of a particular rank or standing, status depends on a determination of the rights and the correlative duties possessed by the entity or entities under consideration. That is, status is determined by the acknowledged rights of the entity or entities under consideration. As one writer has stated: "The legal condition of each class is its status and that status is shared by each member of the class and becomes the measure of its capacity for rights."[25]

Foreign states have acknowledged that the class of international persons known as the British Dominions possess certain rights. Those acknowledged rights constitute the legal condition of the British Dominions and so constitute their status, which is shared by each Dominion and which becomes the measure of its capacity for rights.

The rights possessed by the British Dominions are: First, the right to be individual states in international law when their formal chief executive gives formal notice that he acts solely on their individual behalf; secondly, the right to be self-willing, equal members, by self-imposed obligation, in, and the right jointly and collectively to form, a group-entity known as the British Empire or British Commonwealth of Nations, which also is a state in inter-

[24] Hall, International Law, 8th ed., p. 31. [25] Dickinson, Equality of States, pp. 3–4.

national law; thirdly, the right to have a common King, who acts for the group-entity and who, by specific delimitation of his power to bind the group-entity, acts on behalf of any one of them at will; fourthly, the right to be British, that is, to owe allegiance to a British King.

The legal condition of the British Dominions differs from that of any other entity, or member of a class of entities, known to international law. Through the recognition by foreign states of their different legal condition they have created a new status in international law and that status is Dominion status.

RECENT DEVELOPMENT IN THE LAW OF UNNEUTRAL SERVICE

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The scope of activities covered by the rules of unneutral service is much more limited than one might casually suppose from the term itself. As determined by practice, the activities included are only those of privately owned vessels, committed in such a way as to afford actual assistance to a belligerent force, and of such a nature as to constitute a hostile action for which the agent might be found responsible.

At the time of the origin of the modern rules of unneutral service, only two acts were comprehended, namely, the carriage of troops for a belligerent state, and the carriage of belligerent despatches. The English courts, during the first decade of the nineteenth century originated and elaborated the rules dealing with such acts in a long series of cases, some of which were decided by the House of Lords, while others came before the High Court of Admiralty.[1]

Since the time of those decisions the law of unneutral service has been developed in two main respects. In the first place there has been an increasing tendency to apply the rules more extensively to a larger number of activities and vessels. Second, alterations or innovations have been made in the rules themselves as set forth by the early courts, with the obvious purpose of adapting them more adequately to modern conditions of commerce and life. This article presumes to confine itself to a treatment of these two lines of development, taking them up in the order named.

It is to be noticed first, in connection with the extension of the rules of unneutral service to new activities, that whereas the original court decisions had an occasion to accord an enemy status only to such enemy-controlled vessels as were carrying belligerent troops or despatches, later practice has extended the status to such vessels when engaged in other kinds of activities. In the latter situations, as in the former, the presence of enemy control has been the determining factor and the nature of the act committed has been secondary. In the case of the *Rebecca*, decided as early as 1811, the Privy Council condemned a neutral Dutch vessel on the ground that it was chartered by the enemy government although its operations involved only

[1] Orozembo, 6 C. Rob. 430 (1807); Atalanta, 6 C. Rob. 440 (1808); Constitution, 6 C. Rob. 455 (1802); Hope, 6 C. Rob. 456 (1803); Tendre Sostre, 6 C. Rob. 455 (1807); Susan, 6 C. Rob. 461 (1808); Constantia, 6 C. Rob. 440 (1808); Caroline, 6 C. Rob. 464 (1808); Madison, Edw. 234 (1810); Rapid, Edw. 228 (1810); Carolina, 4 C. Rob. 256 (1802); Friendship, 6 C. Rob. 420 (1807).

ordinary commerce.[2] Similarly, in the case of the *Australia*, adjudicated during the Russo-Japanese War, a Japanese court condemned a neutral vessel controlled by a Russian supercargo and carrying enemy contraband.[3] During the World War several cases of a similar nature were decided. For instance, in the case of the *Thor* a British prize court condemned a Norwegian vessel chartered by the Hamburg-Amerika line and used for the purpose of coaling a German cruiser.[4] In the course of the decision, the court made direct reference to the case of the *Rebecca*, quoting from it as follows: "A neutral vessel chartered or employed by a belligerent government to carry a cargo on its behalf and acting under the orders of that government or its officers is liable to condemnation as an enemy ship, together with the cargo so carried." The case of the *Pontoporus*, decided by an English court in 1915, and the case of the *Heina*, decided by a French court in the same year, involved similar rulings.[5]

The significance of the cases that have been surveyed lies in the fact that they treated neutral vessels as guilty of unneutral acts when, as vessels chartered by the enemy, they had been engaged in such ordinary enterprises as coaling enemy cruisers, carrying contraband, or indulging in ordinary commerce. The original cases dealing with unneutral service had not gone so far. They had treated enemy-controlled neutral vessels as guilty of unneutral service when carrying troops or despatches, but had not had occasion to adjudicate in cases where such vessels had been engaged in various other forms of activities.

A second extension of the rules of unneutral service is a somewhat more recent idea. The use of wireless telegraphy has afforded neutral ships a new means of great importance for the performance of unneutral acts in behalf of a belligerent, enabling them much more rapidly and effectively than ever before to transmit information and messages beneficial to belligerents. There is, of course, complete justification in reason for the practice of according an unneutral status to vessels permitting aid to a belligerent through the use of wireless apparatus located on board. Yet writers have commonly failed to discuss the matter, except as it may be inferred from some such general phrase as "transmission of intelligence in behalf of a belligerent." Even the Declaration of London in 1909 did not specifically refer to the unneutral use of wireless apparatus, though it did include such general phrases as "transmission of intelligence in the interest of the enemy" and "transporting one or more persons who, in the course of the voyage, directly assist the operations of the enemy."[6] The failure to recognize sooner the possibility of unneutral service through the use of the wireless may be explained in large

[2] 2 Acton, 119.
[3] 2 Hurst and Bray, p. 373.
[4] 1 Br. and Col. P. C. 229.
[5] The Pontoporus, 1 Br. and Col. P. C. 371; The Heina, *Conseil des Prises*, p. 157.
[6] Article 45, Declaration of London.

part by the fact that vessels have used such mechanism only since 1900, and consequently the need of rules has been a comparatively recent development.

Some of the first applications of the idea of unneutral service to the use of wireless are to be found in the naval instructions of certain states. A provision of the French naval instructions of December, 1912, reads as follows:

> If circumstances require and to the extent that you deem indispensable, you may give notice to merchant vessels equipped with wireless that are within the zone of operations that they are forbidden: (1) to transmit information regarding your position or movements; (2) to register telegrams, either plain or cipher, that come from your vessels.[7]

The German Prize Code, drawn up in 1909, contained a provision similar to that of the Declaration of London, but went on to say that the phrase "transmission of intelligence" would be so construed as to include wireless.[8]

The most convincing application of the status of unneutral service to the use of wireless apparatus in behalf of belligerents came during the World War in the case of the *Bangor*, decided by the English Privy Council in 1916.[9] The case involved a Norwegian vessel which had been captured in the Strait of Magellan. Before the prize crew boarded the ship, those on board had removed and stowed away the wireless messages, together with the messages which had been previously received. The court decided that the evidence of unneutral use of the wireless apparatus was sufficient to warrent condemnation of ship and cargo. The significance of the case rests upon the authority which it provides for the extension of the rules of unneutral service to a new type of activity.

There is another activity to which the rules of unneutral service have been extended in recent years. Prior to the World War, there had been no precedent for the treatment in such a category of merchant vessels registered in allied states or in the state to which the capturing vessel belongs. Furthermore, it was a subject to which publicists had not devoted themselves. In 1916, in the case of the *Iro-Maru*, the French *Conseil des Prises* condemned a Japanese vessel on the ground that it "is a legal prize if it is engaged in a voyage, the special object of which is to transport an agent of an enemy state charged with the carrying of letters or news in the interest of said state."[10] Quite similar was the ruling of a British court in New South Wales in the case of the *Zambesi*, decided in 1914.[11] In this case, the rules of unneutral service were applied to a British vessel which, in ignorance of the existence of a state of war, had been chartered by German officials to Nauru to carry despatches to another small German island located nearby.

It would be very easy to overestimate the significance of the two cases

[7] *Revue Générale de Droit International Public.*
[8] Huberich and King, The German Prize Code, p. 34.
[9] 2 Br. and Col. P. C. 206.
[10] *Journal Officiel*, Dec. 25, 1916.
[11] 1 Br. and Col. P. C. 358.

that have just been mentioned. Such vessels as those involved are obviously very closely related, on the one hand, to vessels engaging in trade with the enemy, and, on the other hand, to ships participating in treasonable activities. It would be very difficult to draw a precise line between actions belonging exclusively to those different categories. Yet the above cases constitute considerable authority for a limited application of the rules of unneutral service to vessels registered in allied states and in states to which the capturing ships belong.

A fourth extension of the rules of unneutral service has been to neutral vessels engaged in the scouting service of a belligerent. The original decisions had to do only with the carriage of information in the form of written despatches. In the case of the *Quang-Nam*, decided in 1905, a neutral (Chinese) vessel was condemned for engaging in scouting service for the enemy.[12] A similar decision was made in the case of the *Industrie* (1905).[13] These cases represent an extension that was entirely natural in the view of the nature of the early decisions.

Some of the more recent publicists have called attention to the reasonableness of applying the rules of unneutral service to activities of neutral aeroplanes.[14] As yet, however, there has been no definite application in any way.

In addition to the widening application of the law of unneutral service to new forms of activities, there has been a growing tendency to adopt alterations or innovations in the rules themselves in order to make them better fitted to meet modern conditions. Among these changes there are a few of outstanding significance, to which attention may now be directed.

In the first place, there has been a tendency toward a more exact definition of the classes of persons that may not be carried by a neutral vessel without involving it in unneutral conduct. The early cases of the English courts had to do entirely with the transportation of soldiers, and they shed no light on the status of other noxious persons. In recent decades the return of reservists to their native country for the purpose of participating in an existing war has presented a problem of increasing importance in connection with the subject of unneutral service. If their transportation were to be considered on the same basis as the transportation of troops, the guilty vessel would be liable. Prior to the World War there was much authority in favor of exempting neutral vessels carrying such persons from the penalties of unneutral service. Writers had not discussed the matter widely, but when they did give any attention to it, they invariably agreed that the act was permissible. For instance, in 1881, Bluntschli wrote, "Transportation of peaceful immigrants is not forbidden by the law of war even when those persons intend to enroll in belligerent armies."[15] Vetzel refers to the fact

[12] Takahashi, International Law Applied to the Russo-Japanese War, p. 735.
[13] *Ibid.*, p. 732.
[14] Fauchille, *Traite de Droit International Public*, 1921, Vol. 2, p. 895.
[15] Bluntschli, *Le Droit International*, paragraph 1815–18.

that during the Franco-Prussian War there was no objection raised to the practice of carrying German reservists on English ships from the United States to Germany, and concludes that there must have been actual enrolment before a person may be considered as a soldier.[16] Article 7 of the Resolutions of the Institute of International Law in 1896 expresses a similar opinion.[17] Article 47 of the Declaration of London uses the phrase "embodied in the armed force of the enemy," but Articles 45 and 46 are without any such specification.[18] The report of the drafting committee, however, contained an interpretation of all three articles which shows conclusively that the transportation of reservists was not to be considered as an unneutral act. The German Prize Code of 1909 definitely stated that reservists might be carried by neutral vessels.[19] Generally, up to the period of the World War, opinion and practice concurred. During the World War, however, certain events transpired which detracted somewhat from the force of the rule and displayed a tendency toward the formulation of a more stringent rule according to which neutral vessels found carrying reservists might be treated as guilty of unneutral conduct. In the first place, the French *Conseil des Prises*, in the cases of the *Federico* and the *Rosita* ordered the condemnation of neutral vessels carrying German reservists.[20] In the second place, Great Britain, in actual fact, removed many reservists from neutral ships and in her correspondence with the United States in the affair involving the *China*, she definitely stated her intention of departing from the practice of the past.[21] A question may be appropriately raised as to how much effect the practice of the World War could have on a rule of law that had previously received general support. In attempting to answer that question, it should be kept in mind that British practice during the World War was avowedly undertaken as a reprisal. On the other hand, the French position was stated in judicial decisions, and, in view of the paucity of decisions dealing with the status of reservists, they cannot be disregarded. The safest view of the matter seems to be that while recent practice has not dislodged the older one, it does evince a tendency to do so. It doubtless results from the modern conditions of commerce, which permit so readily the transportation on a huge scale of men who are potential participants in an existing war. In view of such conditions the tendency toward the alterations of the old rule appears to be entirely justifiable.

In like manner, the question of the status of other noxious civilians bent on errands unfavorable to one of the belligerents has been an issue of growing importance. In the case of the *Rebecca*, decided in 1811 by the English

[16] Vetzel, *De la contrebande par Analogie*, p. 28.
[17] 15 *Annuaire de l'Institut de Droit International*, p. 123.
[18] The Declaration of London. Edited by J. B. Scott, p. 162.
[19] Huberich and King, The German Prize Code, p. 34.
[20] The Federico, *Conseil des Prises*, p. 162; The Rosita, *Conseil des Prises*, p. 17.
[21] This JOURNAL, 1916, Special Supplement, pp. 427–32.

Privy Council, the court said, "No case has ever yet occurred where persons found on board in the employment of the enemy in a purely civil capacity have ever induced condemnation of a ship."[22] Since that time there has been no judicial decision contrary to that opinion. However, as in the case of reservists, there have been several incidents involving protests of belligerents against the transportation of noxious civilians by neutrals, less recent, to be sure, but none the less exemplary of a real tendency to treat the neutral vessels involved as guilty of unneutral service. One of the earliest incidents was the *Trent* affair, at which time the United States protested against the transportation by England of the Confederate commissioners.[23] During the Chino-Japanese War Japan protested against the transportation by a French vessel, the *Sydney*, of two Americans who were supposed to be carrying inventions helpful to China.[24] A similar incident occurred during the World War when England objected to the carriage by the American vessel, the *China*, of noxious persons alleged to be on their way to India to incite a revolution.[25] Though less pronounced than where the transportation of reservists is involved, there appears to be a growing opposition to the transportation of noxious civilians by neutral vessels.

A second tendency which has been fostered for the supposed purpose of adapting the law more adequately to modern conditions is to be found in the attempt to distinguish between less serious and more serious cases of unneutral service and to apply a different sort of treatment to each. It is best seen in Articles 45 and 46 of the Declaration of London. In spite of the lack of legal binding force, the articles of that document are significant as showing the nature of the desires of the nations at the time of formulation. Articles 45 and 46 made an attempt to distinguish between neutral vessels chartered to a belligerent or under belligerent management and those that have remained under neutral control. In the former case, as specified by Article 46, the ship loses its neutral character and is subject to treatment as an enemy craft. In the latter case, according to Article 45, the vessel may be condemned together with that part of the cargo which belongs to the owner of the vessel, but the neutral character of the vessel is not lost. Such a distinction is a new one, as far as the practice of the past is concerned. It attempts to treat the carriage of troops and despatches, in cases considered to be less serious, as similar to contraband, and treats only the more serious cases as unneutral in character. The practice of the past, as displayed by court decisions and writings of publicists, has always favored the treatment of vessels carrying troops and despatches in all cases as guilty either of the carriage of contraband or of unneutral service. Never have particular actions within the general group, considered to be less serious in nature, been

[22] 2 Acton, 119.
[23] Bernard, Neutrality of Great Britain During the American Civil War, p. 201.
[24] 1 *Revue Générale de Droit International*, 1895, p. 128.
[25] This JOURNAL, 1916, Spl. Supp., pp. 427–32.

segregated from the more serious in nature and a different status assigned to each. Moreover, the distinction by the Declaration of London was not a nominal one, for a guilty vessel which may maintain its neutral character is undoubtedly in a more desirable position. For instance, such a vessel may not be destroyed as prize under the same circumstances that an enemy ship may be, and furthermore the rule that the flag covers the goods will apply to the cargo which does not belong to the owner of the vessel.[26]

It is entirely obvious that the purpose of the distinction was the mitigation of the ordinary penalty in favor of neutral commerce. The instructions of England to her delegates at the London Conference make it clear that that nation was strongly behind the change. Those instructions say, "It would be desirable to arrive at some understanding that inadvertent conveyance by neutral vessels of a few individual soldiers should not entail more than a minimum of interference."[27] That the idea also had the backing of Germany can be seen from the fact that the wording of Article 45 is very much the same as that found in the German memoranda.[28]

Of course the provisions of the Declaration of London dealing with unneutral service, like the entire document, have never had any binding power as such, owing to lack of ratification. Furthermore, the practice of the nations since 1909 has not always followed the lines laid down at the London Naval Conference. Nevertheless, it would be a mistake to fail to recognize that Articles 45 and 46 embody a tendency which may have future significance. The desire of neutral commerce to escape in some situations the ordinary penalty of the past for the performance of unneutral acts may very likely become evident again at some later naval conference.

If the subject does recur at some future conference, it is to be hoped that the solution will not be identical with that made in 1909. There should be no objection to the imposition of a lighter penalty where there has been actually a smaller offense, but Articles 45 and 46 are not constructed in such a way as to insure such a result. They create the possibility that a more advantageous position might be accorded a neutral vessel doing a high degree of service to the enemy under neutral management, than might be accorded a vessel acting under enemy control but serving the enemy less effectively. Article 45 does not limit the number of persons which the neutral ships may carry without acquiring an enemy character, nor does it limit the importance of the despatches that it may convey. Consequently, there is no reason why a neutral vessel could not aid the enemy with very great effectiveness, and still maintain its neutral character. On the other hand, there is every possibility that under Article 46 a neutral vessel which has come under the control of the enemy may be doing a service to the enemy of very slight value in point of fact. It becomes evident that the degree of

[26] A. Cohen, The Declaration of London, p. 118.
[27] The Declaration of London. Edited by J. B. Scott, p. 229.
[28] *Ibid.*, p. 91.

importance of the service which a neutral vessel is rendering will not in all cases, or even in most cases, hinge upon whether it is controlled by the enemy. In other words, the line which the Declaration of London attempts to draw between the more serious and less serious acts of an unneutral nature is not bound to be an accurate one.

Finally, in connection with the recent tendencies that have been caused by modern conditions of commerce, we may notice that the practice of removing troops or noxious persons from a neutral vessel and allowing the vessel to proceed has become more and more common. The change at this point is probably not so much one of law as of practice. As far back as the Napoleonic period the general practice of a belligerent captor was to take the captured vessel into port and put the affair into the hands of a prize court. Yet it seems reasonable to believe that the captor might have waived his right so to act and have allowed the offending vessel to go on its way after delivering up the troops or despatches in question. In several bilateral treaties, such as that drawn up by the United States and Italy in 1871, the practice of removing troops from neutral vessels was specifically mentioned as permissible.[29] On the other hand, the diplomatic correspondence between Earl Russel and Secretary Seward at the time of the *Trent* affair evinces a doubt on the part of the American Secretary about the legality of such an action.[30] His opinion must be discounted somewhat because of the fact that the entire correspondence tended to display an inadequate grasp of some of the legal questions involved.

During recent years the practice of removing noxious persons has become more common. While the Chino-Japanese War was in progress, Messrs. Brown and Howie, two civilian Americans travelling on an errand that was disadvantageous to Japan, were removed from the French vessel, the *Sydney*.[31] The largest number of removals occurred during the World War. In December of 1914, four neutral vessels were stopped on the high seas by the French cruiser *Descartes* and enemy reservists were removed and taken to Martinique as prisoners of war.[32] At about the same time a person by the name of Piepenbrink was taken by a French cruiser from on board the American vessel *Windber*.[33] Later, in 1916, the American vessel, the *China* was stopped by a British vessel of war on the high seas, and despite the captain's protest twenty-eight Germans, eight Austrians, and two Turks were removed from it, none of whom were yet members of the armed forces of the enemy.[34] Very similar in significance was the removal of Colonel Napier and Captain Wilson, two English despatch bearers, from a Greek

[29] Malloy, Treaties, Vol. I, p. 421. Similar treaties are mentioned in Moore's Digest of International Law, Vol. VII, p. 756.

[30] Bernard, Neutrality of Great Britain During the American Civil War, p. 201.

[31] *Revue Général de Droit International*, 1895, p. 128.

[32] Garner, International Law and the World War, Vol. 2, p. 365.

[33] This JOURNAL, 1915, Spl. Supp., pp. 353–360.

[34] *Ibid.*, 1916, pp. 427–432.

vessel, the *Messina*, by a German submarine in December of 1914.[35] These incidents are all indicative of the tendency to modify the older practice to the advantage of the neutral vessel.

Of great importance in this connection is Article 47 of the Declaration of London, which says that "Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel." The obvious purpose of the article was to minimize interference on the part of belligerent cruisers in the activities of neutral vessels. The point of view is well stated by Bentwich, who says in this connection, "The conditions of modern intercourse, with our mammoth liners carrying thousands of passengers, and the greater respect which neutrals demand, necessitate some change in the stricter practice of the Napoleonic wars."[36] The statement expresses very adequately the inconvenience which must be involved in a strict enforcement of the old rule. There appears, indeed, to be no reason why belligerent captors should not be permitted to allow neutral vessels to go free if, for some reason or other, they do not wish to bring them into port.

The conclusion is inevitable that the law of unneutral service as originally enunciated by the English Courts is not entirely suited to the needs of modern life, and that the process of adaptation must continue in the future as it has in recent years. Undoubtedly a wise codification of the law might do much to hasten the process, but in the absence of such action practice and theory will gradually work out a more accurate adaptation of the law to modern needs.

[35] Garner, International Law and the World War, Vol. 2, p. 373.
[36] N. Bentwich, The Declaration of London, p. 91.

EDITORIAL COMMENT

THE ELIMINATION OF THE LOOPHOLES IN ARBITRATION TREATIES

The American Foundation, in a circular letter of May 27, challenges the public opinion of the United States with the "Draft of a Proposed General Treaty for the Pacific Settlement of International Disputes." The publication of the treaty was governed first by the desire of showing that the adherence of the United States to the Permanent Court of International Justice is necessary to the continuance by the United States of its contribution to the cause of arbitration and pacific settlement, and secondly, by the desire to show the practical implications of the popular aspiration to have war "outlawed." The significant feature of the treaty is that it purports to provide for the settlement of every dispute without exception by some form or other of peaceful procedure, whether by conciliation, by arbitration proper, or by judicial settlement. Without specifying which one of these methods must be resorted to in a particular case, the treaty makes it obligatory to have recourse under any or all circumstances to one or other of them.

The purpose of the treaty is thus to bring the policy of the United States in line with the "spirit of Locarno," so that under no possible contingencies, short, of course, of a direct armed attack upon the country, would it be lawful for the parties to the treaty to resort to war. The feasibility of the proposal depends obviously upon the point whether the United States is ready to eliminate from the treaty the usual clause making exception of disputes affecting the honor, the independence, and the vital interests of the country, and in consequence this question is made the subject of a special questionnaire by the American Foundation in its letter submitting the draft. Before passing to a discussion of this issue it might be well to note that the so-called "treaties of conciliation," such as the Wilson-Bryan treaties of 1914, officially designated as "Treaties for the Advancement of Peace," while they cover all disputes without exception, do not involve an absolute obligation to accept the report of the conciliation committee, but merely an obligation to refrain from hostilities for a given period. The draft treaty under examination, by combining in one treaty forms of procedure hitherto accepted in isolation, and by making a resort to arbitration or to judicial settlement obligatory if the method of conciliation should fail, closes the loopholes left in the earlier treaties and thus makes the outlawry of war absolute.

It was not until the first decade of the twentieth century that the movement for the conclusion of "general" arbitration treaties began to make significant progress. The term "general" here refers not to the number of parties to the treaty but to its scope, thus making a distinction between

the special agreement or *compromis*, by which disputes already become acute were submitted to arbitration, and the general agreement concluded in anticipation of possible future disputes. On occasion, as in the treaty of 1848 between the United States and Mexico, clauses were inserted in treaties by which the parties pledged themselves in advance to have recourse if possible to arbitration in the event of future disputes arising between them; but such pledges were generally so loosely worded as not to constitute an obligation likely to prove embarrassing at a later time.

Following the example set by some of the South American States during the closing years of the nineteenth century, Great Britain and France concluded in 1903 the well-known agreement which was made the basis of the treaties entered into by the United States in 1908, popularly known as the Root treaties. These treaties introduce the phrase, now described as "traditional," in accordance with which arbitration is accepted for "differences which may arise of a legal nature or relating to the interpretation of treaties . . . provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties." The exceptions here made to the obligation to arbitrate are twofold: on the one hand disputes not properly to be described as legal are eliminated, and on the other hand even a legal dispute would not come under the treaty if it affected the vital interests, the independence, or the honor of either party. The loophole was, of course, big enough to drive the proverbial coach and four through it.

The unratified Taft-Knox treaties of 1911 showed a great improvement in phrasing even if in their actual scope they went little further. They lay stress upon what *can* be arbitrated rather than upon what can not. The agreement was to arbitrate "differences . . . which are justiciable in their nature," and these were defined to be differences "susceptible of decision by the application of the principles of law or equity." The phrase "law or equity" is in itself an enlargement upon the "legal" disputes of the treaties of 1908, and in addition the objectionable proviso of the treaties of 1908 was eliminated. But for all that, the loophole of escape remained a wide one, especially when the Senate insisted upon determining in each case whether the particular dispute was justiciable or not.

In the meantime the two Hague Conferences contributed their share to the movement for the acceptance of an obligation to arbitrate, but the convention of 1899 went no further than announcing that in questions of a legal nature, and especially in the interpretation of international conventions, arbitration was recognized "as the most effective and at the same time the most equitable means of settling disputes which diplomacy had failed to settle." This pious *voeu* was confirmed in 1907 by a further aspiration proclaiming the desirability of a recourse to arbitration "in so far as circumstances permit." The drawbridge was down; any nation might leave the castle at will, and in evading its obligation it might announce, in the words

of the Final Act, that it still believed "in the principle of compulsory arbitration."

Certain South American States, such as Chile and Argentine in 1902, had, indeed, concluded treaties in which the obligation to arbitrate future differences was assumed with almost negligible qualifications. But commendable as these were regarded in respect to the parties to them, no one thought them immediately applicable to the great Powers.

In the Covenant of the League of Nations the obligation to arbitrate assumed in Article 13 is made conditional upon the recognition by the parties that the dispute is "suitable for submission to arbitration," and while this loophole is so wide that practically no obligation whatever is assumed, there is nevertheless the alternative obligation, assumed without qualification, to submit the dispute for inquiry by the Council. We have here the choice of alternatives which has since become popular in different forms. In the case of the draft treaty proposed by the American Foundation the reversal in the order of the alternatives offered makes the obligation of final peaceful settlement absolute instead of conditional.

While the Statute of the Permanent Court of International Justice does not itself involve any obligation whatever to arbitrate a particular dispute, there is attached to it the Optional Clause which creates an absolute obligation to arbitrate four sets of cases defined in Article 36 of the Statute. But even here there is still a wide loophole left of escape. The first two groups are those covered by the Root treaties, while the two other groups merely include questions of fact and the determination of damages for admitted wrong done.

It is only with the Locarno agreements of 1925 that we reach the stage where the parties are willing to agree upon the settlement by peaceful procedure of disputes of every kind under every possible set of circumstances. The loopholes appear to be substantially closed, although there is still one left which a legal ferret might find. The characteristic of these agreements is that in respect to disputes "with regard to which the parties are in conflict as to their respective rights" they offer the alternative method of conciliation before a resort must be had to arbitration or to judicial settlement, and on the other hand in respect to disputes not coming within that class they make resort to conciliation obligatory, and in the conceivable event of the failure of such procedure they require resort to the Council of the League of Nations under Article 15 of the Covenant. It is in this last event that a possible failure of peaceful procedure might result, should the decision of the Council not be unanimous.

Coming back to the draft treaty proposed by the American Foundation, it is significant to note that while its proponents offer it as following the "Locarno spirit," with a statement that "the Locarno treaties cover 'all disputes of every kind,'" the treaty actually covers only "all controversies whatsoever of an international character." This phrase is explained by a

statement that "the question of omitting the traditional restricting clause [honor and vital interests] has nothing to do with the very different question of the necessity of excluding domestic matters from the scope of international treaties." This would seem to be taking away with the one hand what has been given with the other, not to speak of the legal difficulties it creates. Is the control of immigration a "domestic question"? Certainly not when it is so exercised as to discriminate against a particular nation and give rise to a claim by that nation that the international rule of the equality of states has been violated. The claim may be unfounded, but the moment it is made the question at issue becomes an international one. Hence to exclude "domestic questions" from the treaty when those questions give rise to an international controversy is, in view of all that vague phrase may imply, to keep open the very loophole which the treaty appears at first to close.

In the opinion of the writer it is neither practicable to expect the United States nor desirable to have this country enter into an arbitration treaty in which the obligation assumed is subject to no restrictions whatever,—and this is said without any failure to appreciate the splendid action taken by the parties to the Locarno agreements, where the circumstances materially differed. At the same time the proviso excepting "honor and vital interests" from the scope of the obligation to arbitrate is wholly unsatisfactory, and it should be eliminated in favor of a clause stating more exactly and more frankly the international situation. The need of some qualification in the obligation to arbitrate is due to the fact that international law is still upon many points uncertain and ill-defined. Taking the touchy question of immigration as an example, international law recognizes the right of a state to determine whether aliens should be admitted into its territory for purposes of permanent residence; but international law is not so clear as to the circumstances under which the state may exclude immigrants from one country while admitting them from other countries. Conceding that there must be a "reasonable ground" for such discrimination, the phrase is too broad to be left to the determination of an arbitration tribunal without some enumeration of the circumstances that might constitute such "reasonable ground." In due time it is to be hoped that such a development of international law may be worked out (codified), but in the meantime the individual state must be left to decide the point, it is to be hoped in good faith and fair play.

As a substitute for the "honor and vital interests" clause it is suggested that the obligation to arbitrate be accepted *on the basis of existing international law*, that is to say, any case coming before an arbitration tribunal or before the Permanent Court of International Justice would have to be decided, if not upon rules specially agreed upon, then on the basis of the rules of law recognized by the parties before the dispute took place, and it should be left open to either party to protest the decision on the points of law applied by the court to the decision of the case. This basis is narrower than

that laid down in Article 38 of the Statute of the Permanent Court, but it would seem to be the only one upon which it is feasible to demand that an obligation to arbitrate, unqualified in other respects, be accepted by the United States under present conditions. Something must still be left to the development of international law in the future.

After the obligation to arbitrate has been qualified in this or a similar way, it is suggested that the order of the Locarno treaty between France and Germany be followed: arbitration or judicial settlement of all claims based upon international law or upon questions of fact, with prior resort to diplomatic negotiation, and to conciliation if so desired; then conciliation for all other controversies of whatever kind, as in the Wilson-Bryan treaties of 1914.

C. G. FENWICK.

THE LAUSANNE TREATY

The treaty of amity and commerce between Turkey and the United States signed at Lausanne on August 6, 1923, failed of ratification by the United States Senate on January 18, 1927, by a vote of fifty in favor and thirty-four against, just six votes short of the two-thirds majority required by the Constitution. Owing to the fact that the treaty was discussed in secret executive session the reasons for its rejection have not been definitely disclosed. It is understood, however, that the opposition to the treaty was based principally on two grounds, namely, the absence of definite guarantees concerning naturalized American citizens of Turkish origin, and sympathy for the Armenians whose national aspirations had been sacrificed by the Allied Powers at Lausanne.

This failure to establish the relations between Turkey and the United States on a formal treaty basis can only be regretted most deeply. The danger of hostile measures of resentment on the part of the Turkish Government because of the rejection of the treaty by the Senate was obvious. It adopted the statesmanlike policy, however, of doing all in its power to maintain relations with the United States on a generous friendly basis. It agreed not only to continue until June, 1928, the *modus vivendi* of July 20, 1926, providing for most-favored-nation treatment in customs matters, but also, through the exchange of notes with Rear Admiral Bristol, American High Commissioner in Turkey, under date of February 17, 1927, entered into a general agreement of a temporary character pending the further consideration and possible ratification of the Lausanne Treaty.

The main provisions of this agreement are as follows:

(1) The establishment of diplomatic and consular relations on the basis of the principles of international law, and the early exchange of ambassadors.

(2) The negotiation of special treaties and conventions on the subjects of

commercial and consular relations, as well as the conditions of establishment and residence of their nationals in the territories of the respective countries.

(3) In the event of the ratification of the Lausanne Treaty, the articles which have a temporary character shall expire on the same date as the corresponding provisions of the treaties and conventions signed by Turkey and the Allied Powers at Lausanne July 24, 1923. In view of the fact that most of these articles are for the duration of seven or five years, a Turkish-American treaty would have a very brief existence.

(4) The treaty of extradition signed at Lausanne August 6, 1923, by Turkey and the United States shall be submitted for ratification at a mutually convenient time.

(5) Negotiations for a naturalization convention are to be undertaken within six months after the coming into effect of a consular convention and of conventions for the establishment and residence of nationals of both nations.

(6) The question of claims is to be dealt with in accordance with the notes exchanged between the Turkish and American Governments at Constantinople, December 25, 1923, on the understanding that the provisions of these notes will come into force six months after the ratification of the above mentioned conventions, together with the commercial convention. While these notes have not been published, it is understood they provide for the creation of a joint commission of Americans and Turks to examine into the question of claims and to make suggestions for their proper consideration and settlement.

(7) The reciprocal treatment to be accorded the nationals of either party, pending the negotiation and ratification of formal treaties and conventions, is to be based on the principles of international law and the "essential" provisions and annexes of the Turkish-American treaty signed at Lausanne, August 6, 1923.

It may be seen from the above summary that, while this *modus vivendi* affords a generous measure of protection to American interests in Turkey, it is of a restricted character both as to content and duration, and subject to varying interpretations liable to prove mutually vexatious. It is highly dubious, moreover, whether the ratification of the Lausanne Treaty at this time would prove of much value inasmuch as, in any event, the negotiation of a fresh treaty and of conventions on such specific subjects as commerce, consular rights, naturalization, and conditions of establishment and residence of nationals, would be imperatively demanded in the near future. The United States cannot claim greater privileges in this respect than the other Powers who signed the Lausanne agreements of July 24, 1923. Mere temporary agreements are of slight value in defining explicitly the rights of Americans in Turkey. American interests must be placed on a sound footing for all time, as far as may be possible, in order that the United States may continue to fulfill effectively its high mission in the Near East. The appoint-

ment of the Honorable Joseph C. Grew, Under Secretary of State, as Ambassador to Turkey is a guarantee that the special problems existing between the two countries will be handled with wisdom and skill, in view of Mr. Grew's exceptional knowledge of the situation and his great ability shown as American representative at the conference of Lausanne in 1923. The resumption of full diplomatic relations with Turkey after an interval of more than ten years since their abrupt severance by that nation on April 20, 1917, cannot fail to afford a favorable basis for the discussion and the settlement of all outstanding difficulties. Rear Admiral Mark L. Bristol, who served as American High Commissioner with an indeterminate status under most anomalous and trying conditions for more than eight years, is deserving of the highest praise for the resourceful and statesmanlike manner in which he was able, largely through his personal prestige, to secure proper respect for American interests and to maintain confidence in the United States.

PHILIP MARSHALL BROWN.

THE SUPREME COURT INTERPRETS THE LIQUOR TREATIES

The Supreme Court of the United States has just rendered its first decision affecting the interpretation and application of the treaties recently concluded for the prevention of the smuggling of intoxicating liquors.[1] Reported as Ford et al. *v.* United States,[2] Mr. Chief Justice Taft's opinion in the case is an important contribution, not only to the interpretation of the treaties, but also to the clarification of difficult questions of law and jurisdiction in the marginal seas.

Popularly known as the case of *The Quadra*, Ford *v.* United States arose out of the smuggling operations of the Consolidated Exporters Corporation, Limited, of Canada. This corporation chartered several British vessels, among them *The Quadra*, which it loaded with liquor at Vancouver and cleared ostensibly for Central or South American ports. In fact the vessels were directed to proceed to the California coast, between the Farallone Islands and Golden Gate, where they hovered and unloaded their cargoes into motor boats which smuggled the liquor ashore. The smuggling operations were controlled and the vessels were to some extent directed and supplied from San Francisco by Belanger, a director of the Canadian corporation, and Quartararo, its most active agent in California. While thus engaged *The Quadra* was seized by the United States coast guard off the Farallones, outside the three-mile limit, but within the twelve-mile limit and within one hour's sailing distance of land. Ford, Harris, and Evelyn, master, first officer, and second officer, respectively, of *The Quadra*, with

[1] Decision rendered April 11, 1927. For discussion of the liquor treaties, see this JOURNAL, Vol. 20, pp. 111, 340, 444, and *Revue de Droit International et de Législation Comparée*, 3d series, Vol. 7, p. 371.

[2] 47 S. Ct. 531; 71 L. Ed. 610.

Belanger, Quartararo, and others, were indicted on a charge of conspiracy to violate the National Prohibition Act and the Tariff Act of 1922. Ten were convicted, including those named above. A motion to suppress evidence on the ground that vessel and cargo were unlawfully seized was denied by the District Court.[3] The convictions were affirmed by the Circuit Court of Appeals.[4] The case was then taken to the Supreme Court on a writ of certiorari.

The principal questions presented to the Supreme Court were, first, whether the seizure of the vessel was in accordance with the treaty; second, whether the treaty by implication prohibits the prosecution of individuals, subjects of Great Britain, found on board the seized vessel and brought within the United States; third, whether the treaty authorizes the prosecution of such individuals not only for the substantive offense of illegal importation or attempting to import, but also for conspiracy to import; and, fourth, whether persons outside the United States conspiring with other persons inside the United States to commit illegal acts therein may be prosecuted for such acts when found within the United States.

As regards the first question, the decision depended chiefly upon the admissibility and weight of evidence; and the Supreme Court found no occasion for disturbing the decision approved by the lower tribunals. The decisive considerations were matters peculiarly within the province of the trial court. The trial court had found that the seizure was in accordance with the treaty and the Circuit Court of Appeals had affirmed the trial court's decision. The Supreme Court found no grounds for reversal.

The second question, on the other hand, was one which must require sooner or later an authoritative answer from the nation's highest court. It was a difficult question of treaty interpretation, arising, it may be added, from an unfortunate ambiguity in the treaty text. The first paragraph of Article II of the applicable liquor convention[5] permitted United States authorities to board suspected British vessels outside territorial waters "in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States . . . in violation of the laws there in force." "When such enquiries and examination show a reasonable ground for suspicion," this paragraph concluded, "a search of the vessel may be instituted." The second paragraph of the same article, on the other hand, provided that "if there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against

[3] 3 F. (2d) 643.

[4] 10 F. (2d) 339.

[5] Article II is practically identical, *mutatis mutandis*, in all the liquor conventions which have been concluded to date. See this JOURNAL, Vol. 20, p. 340; U. S. Treaty Series, No. 738 and No. 749.

the laws of the United States . . . prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States . . . for adjudication in accordance with such laws."[6] Thus the one paragraph provided expressly for examination of persons and cargo, while the other providing for seizure and adjudication referred only to the vessel. Was this intended to prohibit proceedings against individuals found on board the vessel seized? The Supreme Court answered that it was not. Delivering the opinion of the court, Chief Justice Taft said:

> The inference that both ship and those on board are to be subjected to prosecution on incriminating evidence is fully justified by paragraph 1 of Article II in specifically permitting examination of the ship papers and inquiries to those on board to ascertain whether not only the ship but also those on board are endeavoring to import or have imported liquor into the United States. If those on board are to be excluded, then by the same narrow construction the cargo of liquor is to escape adjudication, though it is subject to search as the persons on board are to inquiry into their guilt. It is no straining of the language of the article therefore to interpret the phrase "the vessel may be seized and taken into a port of the United States . . . for adjudication in accordance with such laws," as intending that not only the vessel but that all and everything on board are to be adjudicated. The seizure and the taking into port necessarily include the cargo and persons on board. They can not be set adrift or thrown overboard. They must go with the ship—they are identified with it. Their immunity on the high seas from seizure or being taken into port came from the immunity of the vessel by reason of her British nationality. When the vessel lost this immunity, they lost it too, and when they were brought into a port of the United States and into the jurisdiction of its District Court, they were just as much subject to its adjudication as the ship. . . .
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> What reason could Great Britain have for a stipulation clothing with immunity either contraband liquor which should be condemned or the guilty persons aboard when the very object of the treaty was to help the United States in its effort to protect itself against such liquor and such persons from invasion by the sea? To give immunity to the cargo and the guilty persons on board would be to clear those whose guilt should condemn the vessel and to restore to them the liquor, and thus release both for another opportunity to flout the laws of a friendly government which it was the purpose of the treaty to discourage. The owner of the vessel would thus alone be subjected to penalty and he would suffer for the primary guilt of the immunized owner of the liquor. Such implication of immunity leads to inconsistency and injustice. The palpable incongruity contended for is such that without express words, we can not attribute to the high contracting parties, intention to bring it about.[7]

The third question was also resolved against the defendants, the court holding that the treaty authorizes prosecutions for conspiracy to import

[6] 43 U. S. Stat. at L. 1761. [7] 47 S. Ct. 531, 536, 537; 71 L. Ed. 610, 616, 617.

no less than for illegal importation. Delivering the opinion, Chief Justice Taft said:

> Considering the friendly purpose of both countries in making this treaty, we do not think any narrow construction should be given which would defeat it. The parties were dealing with a situation well understood by both. In effect they wished to enable the United States better to police its seaboard by enabling it within an hour's sail from its coast, beyond its territorial jurisdiction and on the high seas to seize British actual or would-be smugglers of liquor and, if they were caught, to proceed criminally against them as if seized within the three-mile limit for the same offenses in reference to liquor importation. No particular laws by title or date were referred to in the treaty but only the purpose and effect of them. Plainly it was the purpose of the contracting parties that vessels and men who are caught under the treaty and are proven to have violated any laws of the United States, by which the importation of liquor is intended to be stopped through forfeiture or punishment, may be prosecuted after the seizure. The National Prohibition Act expressly punishes the importation of intoxicating liquor. The Tariff Act of 1922 declares it an offense to make any illegal importation and so makes it an offense to import intoxicating liquor. Section 37 of the Criminal Code makes it an offense to conspire to violate the Prohibition Act and the Tariff Act in respect to the importation of liquor, if the conspiracy is accompanied by overt acts in pursuance of it. The conspiracy act is the one most frequently used in the prosecution of liquor importations from the sea, because such smuggling usually necessitates a conspiracy in preparation for the landing. We think that any more limited construction would not satisfy the reasonable expectations of the two parties. . . . This is not a case for keeping within the technical description of a particular offense. . . . Any law, the enforcement of and punishment for which will specifically prevent smuggling of liquor, should be regarded as embraced by the treaty.[8]

Finally, it was held that persons outside the United States who conspire with persons inside the United States to commit illegal acts therein may be prosecuted for such acts when found within the United States. In the instant case the officers of *The Quadra* on the high seas were as guilty of a conspiracy to violate United States laws as Belanger and Quartararo who operated at San Francisco. Strassheim *v.* Daily was quoted with approval to the effect that "acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."[9] Chief Justice Taft concluded:

> The overt acts charged in the conspiracy to justify indictment under section 37 of the Criminal Code were acts within the jurisdiction of the United States, and the conspiracy charged, although some of the conspirators were corporeally on the high seas, had for its object crime in

[8] 47 S. Ct. 531, 539; 71 L. Ed. 610, 619.

[9] 221 U. S. 280, 285.

the United States and was carried on partly in and partly out of this country, and so was within its jurisdiction under the principles above settled.[10]

The decision in United States *v.* Ford thus establishes that persons and cargoes no less than ships are within the extraterritorial jurisdiction recognized in the liquor treaties, that the persons whose arrest is thus authorized by the treaties may be prosecuted for conspiracy to import liquor no less than for actual importation, and that persons who participate in such conspiracies from outside the United States may be prosecuted the same as persons participating inside the United States if the United States succeeds later in getting them within its power. The conspiracy section of the United States criminal code, at least, may be effective beyond the three-mile limit. The liquor treaty is interpreted liberally, as treaties should always be interpreted, in order to give full effect to the intention of the high contracting parties.

EDWIN D. DICKINSON.

THE DOCTRINE OF REBUS SIC STANTIBUS AND THE TERMINATION OF TREATIES

The decision of the Chinese Government to terminate its so-called "unequal" treaties with foreign Powers—there are said to be some sixteen of them—is defended, in the main, on a right resulting from the rule of *rebus sic stantibus*, which it is often said is "tacitly annexed to every covenant." Referring specifically to the notification by the Government of China to Belgium on October 27, 1926, of the intention of the former government to terminate its treaty of November 2, 1865, with Belgium, a Chinese scholar says: "China abrogates the treaty on the recognized principle of *rebus sic stantibus*, that is, the tacit condition recognized by international law as attending to all treaties that they shall cease to be obligatory so far as the state of facts upon which they were founded has substantially changed."[1]

The important changes, economic and political, which have taken place in the life of many states in recent years and which are the result of a rapidly developing civilization, have been invoked in an increasing number of instances in defense of claims for the revision or termination of treaties which were entered into when such changes were unforeseen. The principle of *rebus sic stantibus* was invoked by Austria-Hungary in 1908 as a justification, in part, for the annexation of Bosnia and Herzegovina, over which the Treaty of Berlin of 1878 and the Convention of Constantinople had given her the right of occupation and administration.[2] It was on this principle

[10] 47 S. Ct. 531, 541; 71 L. Ed. 610, 621.

[1] Yang Kwang-Sheng, "China Abrogating Unfair Treaties with the Powers," Current History, Feb. 1927, p. 968.

[2] Blociszewski, *L'Annexion de la Bosnie et de l'Herzegovine*, 17 *Rev. Gén. de Dr. Int. Pub.* (1910), p. 441.

that Switzerland demanded a revision of her treaty of 1909 with Germany and Italy relative to the Saint Gothard Railroad, a revision to which Germany gave her consent.[3] The non-observance by the Ottoman Government of the Treaty of London of 1913 with the Allied Balkan Powers was defended on the same principle, namely, that when the treaty was signed the Balkan States were allies with one another, whereas at the time Turkey refused to observe the treaty, they were at war with one another.[4] In May, 1918, the Government of Persia informed the Government of the Netherlands that it regarded as terminated all treaties which had been imposed upon it in recent years, and especially the Anglo-Russian Treaty of 1907 concerning the establishment of spheres of influence in Persia. In 1919 the Government of France invoked the doctrine of *rebus sic stantibus* as a justification for the denunciation of the treaties of 1815 relative to the neutralized zone of Savoy, it being declared that the stipulations of the said treaties no longer "corresponded to the actual circumstances."[5] By Article 31 of the Treaty of Versailles Germany consented to the abrogation of the treaty of 1839 for the neutralization of Belgium for the reason that the régime of neutralization established by the latter treaty no longer "corresponded to the existing circumstances." In November, 1919, the Government of China, relying upon the principle of *rebus sic stantibus*, abrogated unilaterally the conventions of November 5, 1913, and June 7, 1915, with Russia and Mongolia.[6] In January, 1924, the Government of Norway denounced the treaty of November 2, 1907, with Great Britain, France and Germany relative to the guarantee of the territorial integrity of Norway, on the ground that the events of recent years had brought about a change in the international situation which was altogether unlike that which existed at the time the treaty was concluded. By an exchange of notes the other parties consented to the termination of the treaty.[7] Finally, in April, 1924, the Soviet Government of Russia announced that while it did not consider the existing treaties between Russia and other Powers as necessarily abrogated, nevertheless, in view of the changes in the international situation which had taken place since they were concluded, it proposed to examine into their validity from the point of view of the principle of *rebus sic stantibus*.[8]

Other instances in which this principle has recently been invoked as a justification for the termination or revision of treaties might be cited. Considering that the world has been and is now passing through an era of remarkable change, it is not improbable that there will be further demands

[3] Scelle, 20 *ibid.* (1913), pp. 484 *ff.*
[4] Fauchille, *Traité de Droit International Public*, t. I, troisième partie (1926), p. 386.
[5] See Art. 435 of the Treaty of Versailles.
[6] *Rev. de Dr. Int. et de Lég. Comparée*, 2nd ser., t. II, p. 106.
[7] *Ibid.*, 2nd ser., t. VI, p. 299.
[8] Fauchille, *op. cit.*, p. 388.

in the near future for the revision or termination of treaties which were entered into years ago and whose stipulations no longer correspond to the existing conditions and which in some cases have ceased to operate equally as between the parties. The authors of the Covenant of the League of Nations appear to have had this fact in mind when they formulated Article 19, which empowers the Assembly to advise from time to time "the reconsideration by the members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."[9] Manifestly, however, this clause does not give the Assembly itself jurisdiction to revise treaties, and this was the conclusion reached in the case of the appeal of Bolivia in 1921 for a revision of her treaty of 1904 with Chile, which it was said had been imposed on Bolivia by force, and which on account of the failure of Chile to carry out its provisions had left Bolivia without access to the sea.

There is a difference of opinion among text writers as to whether the principle of *rebus sic stantibus* is a recognized rule of international law,[10] but the great majority of them admit that as a principle at least of international morals and public policy it is well established. All admit that, while the general principle is that *pacta sunt servanda* and that no party can by its own act liberate itself from the obligations which it has assumed in voluntarily entering into a treaty engagement, nevertheless they admit that there are exceptional cases when either party has a moral, if not a legal, right to demand that the treaty be revised, replaced by another, or even terminated, a right which may so clearly be justified upon considerations of equity and justice that if the obligation were the result of a private contract the courts would not hesitate to grant relief to the complaining party. What the conditions are which justify a demand by one party for modification or termination of the treaty are not easy to state with precision. Writers on international law are accustomed to say that if there has been a "total," "vital," "essential," or "substantial" change of circumstances since the treaty was entered into, the dissatisfied party may demand to be released from further performance of its obligations.[11] Phillimore thus states the

[9] Since unanimity is required to advise the reconsideration of treaties, and since fifty-six states are now represented in the Assembly, that body is not well fitted for the exercise of such a function. Manifestly the Council, or still more, the Permanent Court of International Justice, might more appropriately have been entrusted with it.

[10] Lammasch (*Das Völkerrecht Nach dem Kriege*, 1917, pp. 142 *ff.*) denied that it was a rule of international law, and so did Bruno Schmidt in his monograph *Über die Völkerrechtliche Clausula rebus sic stantibus* (1907).

Kaufmann, however, adopts the contrary view. *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (1911). And so does Pfaff, *Die Klausel rebus sic stantibus in der Doktrin und der Oesterreichischen Gesetzgebung* (1898).

[11] Compare G. F. von Martens, Law of Nations (Cobbett's trans. 4th ed.), p. 352; Oppenheim, International Law (3rd ed.), Vol. I, p. 692; Kluber, *Europäisches Völkerrecht*, sec.165; Gessner, in Holtzendorf, *Handbuch des Völkerrechts*, Bd. III, S. 80; Jellinek, *Die rechtliche*

rule: "When that state of things which was essential to, and the moving cause of, the promise or engagement, has undergone a material change, or has ceased, the foundation of the promise or engagement is gone and their obligation has ceased."[12] Wharton interpreted the rule of *rebus sic stantibus* to embrace "all cases in which the reason for a treaty has failed, or there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice."[13] It is quite conceivable that owing to political, economic, social, or even geographical events, the equality of obligations and benefits which may have existed at the time the treaty was entered into become so altered that the obligations are entirely or preponderantly on one side while the benefits are on the other, so that it has ceased to be equal in its operation. It may be assumed that the party which now has the burden of the obligation without the corresponding benefits would never have entered into the treaty had it foreseen the events which produced the ultimate inequality. No rule of construction which holds it to a perpetual performance of the obligation under such circumstances can be defended upon any consideration of equity or justice, and if the obligation were one of private law its performance could not be enforced in a municipal court.

Some writers have defined the circumstances under which the rule of *rebus sic stantibus* is applicable in terms so vague and general that the revision or termination of a treaty might be demanded by one party whenever in its opinion the performance of the obligations conflicted in any degree with its interests. Thus Heffter maintained that a state might repudiate a treaty whenever performance of its obligations conflicted with "the rights and welfare of its people,"[14] while Fiore asserted that "all treaties are to be looked upon as null which are in any way opposed to the development of the free activity of a nation or which hinders the development of its industry or commerce, which prevents the exercise of any of its natural rights or which offends in any manner against the principles of absolute justice or

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Natur der Staatsvertrage, S. 62 *ff.*; Taylor, International Public Law, sec. 394; and Kaufmann, *op. cit.*, p. 204.

[12] International Law (2nd ed.), Vol. II, p. 109. Hall (International Law, 3rd ed., 351) thus states the principle: "Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand, a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered."

[13] Digest of International Law of the United States, Vol. II, sec. 137a. Pradier-Fodéré maintained that treaties ceased to be binding when there had been an "essential modification of the circumstances in view of which the treaty had been concluded." *Droit Int. Pub.*, t. II, pp. 927 *ff.* Rolin-Jaequemyns says the "new circumstances" on which the doctrine of *rebus sic stantibus* is based are "only those which make the execution of the treaty materially or morally impossible or which deprive one party of the advantages which the treaty intended to confer." *Rev. de Droit Int. et de Lég. Comp.*, t. 19, p. 46.

[14] *Völkerrecht*, sec. 98.

the supreme law of right."[15] Jellinek and Bluntschli interpreted the rule in somewhat the same general fashion,[16] and so did Treitschke, who went to the length of maintaining virtually that every state has a right to denounce its treaties when they become "antiquated" and replace them with others "more consonant with the circumstances."[17] But so extreme an interpretation can hardly be defended, since it would generally make the continuing validity of treaties dependent upon the judgment or caprice of each party. The most authoritative writers of today are agreed that the rule of *rebus sic stantibus* can be invoked only in very exceptional circumstances, not merely when there has been a natural and normal change of conditions in the life of the state. It is not to be understood that the rule may be invoked in every case where the change of circumstances has resulted merely in the disturbance of the equilibrium of burdens and benefits so that the obligation has become more onerous for one than for the other; the change must be such as to make the continued performance of the obligations flagrantly inequitable, unjust, oppressive, difficult of performance, or derogatory to the dignity or sovereignty of one of the parties.

An extraordinary interpretation of the rule of *rebus sic stantibus* was adopted by certain German and a few American jurists in 1914 in connection with the treaty of 1839 for the neutralization of Belgium. Defending the thesis that the treaty had become obsolete and consequently no longer binding upon Germany, they argued that the increase of Belgium's population between 1839 and 1914, the acquisition by Belgium of the Congo territory in Africa, the increased strength of the Belgian army and the construction by Belgium of certain powerful fortresses, had so altered the situation existing in 1839 as to justify Germany (one of the parties) in regarding the treaty as being no longer binding upon her.[18] The error of this line of reasoning lay in the fact that the changes referred to were not of such a character as to alter in any essential manner, if at all, the obligations of the parties to the treaty of 1839 or the benefits to Belgium and to Europe which it was supposed to create. If the natural increase of population, the acquisition of additional territory, the strengthening of national armaments, etc., are circumstances which render treaties obsolete and terminable at the will of one of the parties, there are few states today which could not rid themselves of their older treaties if they desired to do so.

Manifestly, the difficulty of applying in practice the rule of *rebus sic stantibus* lies in the lack of a common judge to determine in controverted cases whether the change of conditions, which is the basis of the rule, is

[15] *Nouv. Droit Int. Pub.*, t. I, p. 466.

[16] Jellinek, *op. cit.*, pp. 62 *ff.* and Bluntschli, *Droit Int. Cod.*, secs. 415, 460.

[17] "Politics" (Eng. trans. by Dugdale and Torben de Bille), Vol. I, pp. 29, 96.

[18] See Fuehr, The Neutrality of Belgium, Chs. IV, VII; Hampe in "Modern Germany" (Eng. trans. of a work entitled *Deutschland und der Weltkrieg*), p. 363; Schoenborn, *ibid.*, p. 545; and Burgess, The European War of 1914—Its Causes, Purposes and Probable Results, p. 171.

really such as to justify a demand for revision or termination of the treaty. Under these circumstances each party must be its own judge, but unless the dissatisfied party repudiates by its own unilateral act the treaty, the right of the other party to judge for itself whether the changed situation is such as to justify the claim for a release from the obligations of the treaty, must be admitted. Both parties being judges, therefore, a mutual agreement between them becomes necessary. Where this is not possible, a reasonable solution would be the submission of the difference to the Permanent Court of International Justice or to an arbitral tribunal. Considering that in view of the rapidly changing conditions which states today are undergoing, the rule of *rebus sic stantibus* is likely to be invoked with increasing frequency in the future, it is submitted that every treaty might very appropriately contain a clause recognizing the right of each party to demand a revision whenever in its opinion changed circumstances render it substantially unequal in operation,[19] and providing that in case the parties are unable to agree that the changed situation justifies the demand for revision, the question shall be submitted to the decision of a common judge or arbiter. Many treaties in fact provide for the arbitration of differences between the parties relative to the *interpretation*, and some, for example the tripartite treaty relative to the Saint Gothard Railroad referred to above, provide in addition, that differences involving the *application* of treaties shall, upon the demand of either party, be submitted to arbitration. Had Germany declined to consent to a revision of the Saint Gothard Treaty, Switzerland would probably have been justified in demanding that the question of her right to a revision be submitted to arbitration.

In the application of the rule of *rebus sic stantibus* one final question remains a subject of controversy, namely, the extent of the right which it gives the dissatisfied party. Some writers, especially the older ones, lay down the proposition that whenever the change of conditions which is the basis of the rule has actually taken place, the treaty is henceforth to be regarded as obsolete and no longer binding upon the dissatisfied party, and the conclusion is drawn that such party may repudiate it or denounce it by unilateral act.[20] Russia acted upon this principle when in 1870 she declared her withdrawal from the stipulations of the Treaty of Paris of 1856 relative to the neutralization of the Black Sea, and in 1886 from Article 59 of the Treaty of Berlin of 1878 relative to the freedom of the port of Batoum; Austria-Hungary in 1908, when in violation of Article 25 of the Treaty of Berlin she annexed Bosnia and Herzegovina, and Germany in 1914 when

[19] Most of the so-called "unequal" treaties to which China is a party contain a clause to the effect that either party may demand a revision of the treaty as a whole, or of the tariff and commercial provisions, at the end of every ten years. The treaty with Belgium, however, differs from the others in that, apparently, it gives Belgium alone the right to demand revision.

[20] This appears to have been the view of Heffter, Fiore, Treitschke, Jellinek, Pradier-Fodéré, and perhaps Bluntschli.

she maintained that the Belgian Neutralization Treaty of 1839 had become obsolete through the operation of the rule of *rebus sic stantibus*. It is believed, however, that the rule of *rebus sic stantibus* does not give the dissatisfied party an unqualified right to be the sole judge of the existence of the conditions upon which the rule is based and to repudiate, denounce or withdraw from the treaty at will.[21] The most authoritative recent and contemporary writers on international law maintain, more correctly it is submitted, that the rule merely gives the dissatisfied party a right to demand a revision or termination of the treaty, or its replacement by another. It should first approach the other party or parties, lay before them a statement of the reasons why in its opinion the treaty ought to be revised or terminated and ask for a full consideration by them of the merits of the case.[22] This was the attitude adopted by Secretaries Blaine and Olney in respect to the Clayton-Bulwer Treaty which it was desired to replace with another treaty mainly because of changed conditions which had taken place since its conclusion, and this was the course China has pursued in respect to her treaty with Belgium.[23] The action of Russia, Austria-Hungary and Germany in withdrawing from the treaties referred to above or in declaring them to be no longer binding, without consulting the other parties and without endeavoring to obtain a release from their obligations, exposed themselves to the charge of being treaty breakers and disturbers of the peace of Europe. In the cases of Russia and Austria-Hungary it is by no means improbable that had the consent of the other parties to a revision of the treaties been requested in advance through negotiation it would have been given.

It is submitted that a dissatisfied party is justified in repudiating or denouncing a treaty which it has freely entered into only in case the other

[21] The U. S. Court of Claims held that the United States was justified in annulling by legislative act in 1798 the treaty of 1778 with France, partly because of changed conditions, but more especially because of infractions of the treaty on the part of France. *The Brig William* and Hooper *v.* United States 22, C. Cls. 201, 408. Generally, where states have denounced treaties in the absence of treaty right, they have justified their action upon other grounds than mere change of conditions, such, for example, as prior breaches by the other party. Compare Crandall, Treaties, Their Making and Enforcement (2nd ed.), p. 442.

[22] Compare as to this Oppenheim, *op. cit.*, Vol. I, p. 692; Westlake, in *Rev. de Droit Int. et de Lég. Comparée*, 1901, p. 394; Fauchille, *op. cit.*, t. I, pt. 3, p. 384; Scelle, 20 *Rev. Gén.* (1913), p. 499; Winfield, 7th ed. of Lawrence's Prins. of Int. Law, p. 306; Bonfils, *Droit International*, sec. 857; and Blociszewski, 17 *Rev. Gén.*, p. 441.

[23] For. Rels. 1881, p. 554, and Moore, Digest, Vol. III, pp. 189 *ff*. In a memorandum addressed to the President in 1896 Secretary Olney, after reviewing the declarations of Mr. Blaine and Mr. Frelinghuysen, said: "If changed conditions now make stipulations which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter." Moore, Digest, Vol. III, p. 202. A committee of the Senate, however, reported that in its opinion the treaty was obsolete and that the United States was under no obligation to be bound by it. Foster, Practice of Diplomacy, p. 304.

party or parties refuse to consider a request for its revision, termination or replacement by another treaty, or if after considering the request, it is refused, and it is established that in consequence of changed conditions not foreseen or contemplated by the parties at the time of the conclusion of the treaty, it has become so grossly unequal in its operation that the obligations are largely on one side while the benefits are on the other, or that the continued performance of the obligations has become difficult for one party, or interferes with the normal growth of the state or involves a substantial impairment of its dignity and sovereignty. To deny the right of a state to denounce and terminate such a treaty in these circumstances would be to deny it the right to rid itself of an incubus upon its independence and sovereignty to which it never consented and which the other party never meant to impose upon it.[24]

If the treaty was never voluntarily entered into by the dissatisfied state, but was extorted from it under pressure, as some of the Chinese treaties were, and if it is based upon an inequality which was never the result of a change of conditions but was deliberately established by the terms of the treaty itself, and especially if it is an inequality which derogates from the sovereignty of the dissatisfied state, its right to terminate the treaty when the other party refuses to consent to its modification, abrogation or replacement by another one, would seem to be incontrovertible, otherwise the postulate that international law rests upon the principle of equality and sovereignty of states has no meaning in practice.

J. W. GARNER.

IMPORTANT DECISIONS OF THE MIXED CLAIMS COMMISSION UNITED STATES AND MEXICO

Since the publication of the awards of the Mexican-United States Mixed Claims Commission commented upon in a previous issue of this JOURNAL,[1] the Commission has handed down additional awards and rendered certain opinions which warrant special consideration. Among the most important of these is the opinion on the measure of damages in the case of Janes (U. S.) *v.* Mexico, Docket No. 168.[2] In that case, a private individual, a Mexican employee of a mining company, had killed Janes, the American superintendent, because of an alleged personal grievance. The Mexican authorities appear to have been slow and inefficient in pursuing the criminal, so that he escaped either apprehension or punishment. Upon this failure to punish,

[24] Compare Scelle, 20 *Rev. Gén.*, p. 490, who remarks that in such a case the complaining state ought first to endeavor to come to an agreement with its co-signatories, but if it cannot convince them that the principle of *rebus sic stantibus* requires a modification of the treaty, it is no longer bound to consider the treaty as binding upon it and it may therefore denounce it.

[1] Vol. 20 (1926), p. 536.

[2] Printed in the last number of the JOURNAL, April, 1927, p. 362.

the delinquency and responsibility of Mexico were predicated. Claim had been made for $25,000, the amount alleged to have been suffered by the widow and children on account of the murder.

The theory of the American Agency, sustained in part by Commissioner Nielsen,[3] assumed that Mexico, by failing to punish the individual, had condoned and ratified the wrongful act, making it its own, and thus assuming full responsibility therefor. There have indeed been numerous awards of claims commissions in which this theory has been adopted, failure to punish being regarded as complicity in the crime and the damages measured by the loss arising out of the original crime. In some cases, the facts sustain the validity of the theory. The majority of the present Commission refused to accept this theory as an adequate analysis of the legal position in the Janes case. They contended that the commission of the crime, a private act, and the failure to punish, a governmental act, were two independent types of delinquency and that it was incorrect to measure the damages for the governmental act by the damages sustained through the private act. There was no necessary correlation between them. The damage sustained by reason of the governmental delinquency consisted in the sense of indignity, grief and humiliation suffered by the family of the victim in the failure to bring the wrong-doer to justice, but it was not the damage sustained from the original crime. Because it was thus deemed not entirely compensatory, but in a sense punitive, a matter of terminology, the Mexican Agent denied the Commission's jurisdiction to award damages, because Mexico, where the crime was committed, did not, it was alleged, recognize "moral" or mental suffering as an element of damages. This contention all the Commissioners denied, on the theory that Mexican law could not control the measure of damages in opposition to a rule of international law. The Commission held that it was not the indignity to the United States Government, but to the individual claimants, which was to be redressed. Yet in explaining the award of $12,000 damages, a substantial amount, they suggest that "not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the government's attitude." Who suffers this mistrust or lack of safety, for which an award is allowed, is not made clear.

The Commission's theory of separating the individual crime from the government's delinquency is, in principle, to be commended. The old theory had not actually identified the two in all cases; but commissions had used loose language, such as "tacit approval," "ratification," "complicity," "condonation," and, not having any established yard-stick to measure the damages, had taken as the measure either the loss suffered by the family through the crime, or some arbitrary substantial sum indicating the commission's view of the seriousness of the government's delinquency. Where there

[3] See separate statement regarding damages, printed in the last number of the JOURNAL, April, 1927, p. 371.

is proved governmental complicity, deducible from an unqualified or notorious refusal to punish, there is no reason why the Government should not be held responsible for the original act, as if they had commanded it. The "substantial sum" method was in fact adopted by the present Commission, for the award of $12,000 could hardly have been measured by any accurate test. Possibly it was unnecessary to seek to explain it as a supposed measure of the "indignity, grief and humiliation" suffered by the family, plus redress for "mistrust and lack of safety." Probably, also, the nature of the crime was implicit in the sum agreed upon, though explicitly disavowed. Possibly the complete mental separation of the private and the public offense, in measuring the damages, is more fancied than real, more theoretical than actual. The alleged grounds on which damages in such cases are based are often metaphysical, and awarding the amount of the supposed loss occasioned by the original crime has the advantage of simplicity and is supported by considerable authority. The Commission's theory is useful, however, because it is analytically correct and because it recognizes various degrees of governmental delinquency, from a continuous and notorious failure to punish any crime, the assumed equivalent of failure, after opportunity, to prevent, down to occasional and slight lapses, such as slowness of prosecution, inadequacy of punishment, etc. The difficulty will always remain of measuring or computing such degrees of delinquency or the "individual grief" which they cause. That must, in any event, be arbitrary. But the inarticulate purpose of such damages, which may or may not be actually compensatory, must involve the theory that by such penalty the delinquent government will be induced to improve the administration of justice and the claimant government given some assurance that such delinquencies, to the injury of its citizens, will if possible, be prevented in the future.

A very interesting case of state responsibility was involved in the claim of Mexico on behalf of the parents of a child killed by an American officer on border patrol along the Rio Grande (Garcia and Garza *v.* United States, No. 292).[4] The facts showed that a party of Mexicans, including the killed child, was crossing the Rio Grande from the American to the Mexican side on a raft at a point where such crossing was forbidden by the laws of Mexico and the United States. An American patrol officer, named Gulley, believing the party, then at a distance of more than 1500 yards, to be engaged in smuggling, fired a number of shots in their direction, with a view, as he said, to compelling their return to the American side for arrest. He apparently did not know that women and children were aboard the raft and had no intention of killing anyone. Evidently, also, he was not equipped with field glasses. An American military regulation, then in force, had forbidden "firing on unarmed persons supposed to be engaged in smuggling or crossing the river at unauthorized places." Gulley was court-martialed and sentenced to be dismissed from the Army. The commanding general approved the sentence

[4] Printed herein, *infra*, p. 581.

but reserved the case for review by the Board of Review in Washington and by the President. The Board of Review reversed the findings of the court-martial and restored Gulley to duty, on the conclusion, evidently, that he had not violated the military regulations or his legal duty. This decision was approved by the President.

Mexico, in advancing the claim, adopted two theories: (1) that the reversal of the finding of the court-martial was a denial of justice in the narrow sense, possibly like the pardon of a convicted person, and (2) that it was an unlawful killing under international law. The majority of the Commission, Messrs. Van Vollenhoven and Fernandez MacGregor, in their opinion making an award, adopted the second theory, maintaining that the facts indicated a departure by Gulley, independently of the American military regulations, of that standard of care in using firearms against civilians which they deemed to constitute the "international standard concerning the taking of human life." As this is the first time an international claims commission has undertaken to outline in detail the elements of that assumed standard, the tests laid down deserve repetition. They would seem to be the following: "(a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighborhood; (c) it should not be indulged in whenever practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound or kill." The Commission believed that Gulley had failed to meet tests (b) and (d), and they apparently found some moral support in the military regulation against firing on unarmed persons, and in the findings, subsequently reversed, of the original court-martial. The Commission pointed out that they were not deciding whether Gulley could or should have been punished under the military regulations, or that there had been a denial of justice. Taking into account the difficulties of Gulley in determining how best to stop what he deemed a serious violation of law, and the fact that the father of the child knew that crossing at unauthorized places was unlawful, the Commission made a small award of $2,000.

Commissioner Nielsen filed an exhaustive dissenting opinion.[5] His main argument is that the finding of the Board of Review and the President that Gulley had not violated the American law or his legal duty is conclusive on the question of unlawful conduct, unless Mexico can show that the American law or its administration or the President's decision, by arbitrariness or gross error, constituted a denial of justice internationally, or that the American system of law enforcement, as carried out by Gulley, fell below the standard established by other civilized systems. These exceptional facts, Mr. Nielsen

[5] Printed, *infra*, p. 586.

claims, Mexico could not and did not attempt to show. Examining the numerous cases in which damages had been allowed for unlawful killings, either diplomatically or by arbitral award, he pointed out that these had involved serious or inexcusable delinquencies, as in the *Swinney* and *Falcon* cases before the present Commission (Nos. 130 and 278),[6] where customs officials had recklessly fired upon naked or unarmed men swimming in the river. Mr. Nielsen denied that the Commission had power to set up an independent so-called international standard of criminal law by which to test the legality of the acts of municipal law-enforcing authorities.

Much of the difference between the majority and the minority of the Commission is purely verbal, or involves a difference on the issue of "justifiability" of the killing. In part, however, it goes to the Commission's powers and the underlying theory. Mr. Nielsen felt that Gulley's action was justifiable under all the circumstances, in support of which he invokes the findings of the Board of Review and the President. The majority felt that the action was not justifiable, and that they were not bound by a municipal decision holding that it was. Of course, Mr. Nielsen does not maintain that a municipal determination on a matter of international law is binding on an international tribunal, but he does insist that unless it can be shown that a domestic system of law enforcement runs counter to that adopted by other civilized nations—the supposed test of its conformity with international law—no international responsibility can be found. In theory, as it has evolved from practice, if theory can be said to be moulded by practice, the decision of the Commission may, we believe, be approved. Foreign governments complaining of the unlawful killing of their citizens by municipal police officers, especially along an international river, have not been willing to permit the legitimacy of the killing to be determined conclusively by the test either of the municipal laws of the officer's state or of the findings of its municipal courts or by the supposed conformity of the system of law enforcement with that of other countries. Perhaps they should, under a sound theory, subject to proof that the municipal statute or decision or legal system falls below the standard of civilized justice, ordinarily rather a severe charge to sustain. Should such characterizations of delinquency as "criminal negligence," "cruel murder," "gross and culpable negligence," "reckless manner," "without justification or excuse" be left exclusively to the determination of the municipal authorities, presumably honest in their endeavors, and employing tests established by municipal jurisprudence? Perhaps they should, and foreign governments, unable to prove fraud or abuse of power, should be bound thereby. But practice, especially in the relations between strong complaining and weak defendant governments, has developed differently and perhaps, thereby, modified a sound theory. Strong defendant governments, unwilling to abandon the theory of exclusive municipal jurisdiction, have more than occasionally reconciled the national position with the inter-

[6] Printed, *infra*, pp. 562 and 566.

national claim, by making compensation "as an act of grace." We have some experience of this practice in mob violence cases. But when payments are made in a great many successive cases "as an act of grace," the limiting terms lose much of their qualifying force and the recognition of a legal obligation is easily deduced. In the present case, the criminal proceedings involving Gulley were conducted, of course, in the absence of the complainant or of representatives of Mexico, and, incidentally, a Mexican court of inquiry, near the Rio Grande, had concluded that the killing was unlawful. Had the claimant instituted a civil action against Gulley and had the American courts finally concluded that Gulley had not committed a tort, it is highly doubtful whether, no technical denial of justice being established, an international commission should have assumed jurisdiction of the claim or could rightfully have rendered an award allowing damages. But where the killing occurs on an international river and the municipal authorities of the officer's state make an *ex parte* determination that it was not punishable, it is doubtful whether a Foreign Office would feel barred from raising the issue of "justification." International tribunals, with minor exceptions, have not felt so barred. The subject is difficult and complex and deserves more exhaustive examination than space now permits. To its consideration, the dissenting opinion of Mr. Nielsen must be regarded as an important contribution.

A considerable number of the decisions of the Commission deal with assault or other torts committed upon the citizens of one country by individuals or minor officials of the other. In that connection, the opinions contain illuminating discussions of the term "denial of justice," both in the narrower and broader sense, arising out of assaults by police officers (Mallen case,[7] No. 2935), failure to use due diligence to investigate a murder and apprehend the culprits (Neer case,[8] No. 136), unreasonably long detention without trial (Roberts case,[9] No. 185), cruel and inhumane treatment while in jail (Faulkner case,[10] No. 47, Roberts case, No. 185), inadequate punishment of convicted persons (Youmans case,[11] No. 271, Mallen case, No. 2935), or permitting a convict to escape punishment (Putnam case,[12] No. 354). The "special protection" due a foreign consul is ably discussed in the Mallen case, *supra*. The Commission seems firmly convinced that the test of "denial of justice" in these matters is not merely the municipal law, or the equality of treatment of aliens and nationals, but whether the act or omission in question, on which governmental responsibility is predicated, meets the so-called international standard of civilized justice. The Commission thus seeks to establish a kind of international "due process of law," by which the legitimacy and propriety of national action may in last resort be tested. While admitting the impracticability of laying down in advance "precise

[7] To be printed in the next number of the JOURNAL. [8] Printed, *infra*, p. 555.
[9] Printed in the last number of the JOURNAL, April, 1927, p. 357. [10] *Ibid.*, p. 349.
[11] Printed, *infra*, p. 571. [12] To be printed in the next number of the JOURNAL.

and unyielding formulas" by which the question of a denial of justice may uniformly be determined, the Commission nevertheless suggests (Neer case, No. 136) "(first), that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." Such a test, while broad and general, may perhaps be approved. Its value will depend upon its application to particular cases. In this respect, the Commission has had numerous opportunities to analyze facts in the light of the principles thus advanced. Some of the contributions it has thereby made to international law are important and often striking.

EDWIN M. BORCHARD.

FRANCIS W. KELSEY—IN MEMORIAM

For the past few years the Carnegie Endowment for International Peace has been publishing from time to time editions of original texts with English translations, of the works of some of the early writers on the law of nations, under the title of *The Classics of International Law*. The chief of these, without which the series would be acephalous, is the masterpiece of Hugo Grotius, of which it can be truly said, that if his three books on the law of war and peace did not make international law, they nevertheless brought international law before the minds of statesmen and into the practice of nations.

One of the early issues of the series, which makes a specialty of issuing, in perhaps too sumptuous form, a photographic reproduction of the original texts, was that of the edition of 1646 of the treatise, which contained the marginal notes which Grotius had made for a forthcoming issue of his masterpiece. This edition is authoritative, and it is very rare. The translation, of course, would need to be from this text, and it was of the first importance that the translator should be a Latinist to his fingertips, and in personal sympathy with the life and work of Grotius.

The series was fortunate to secure Francis W. Kelsey, Professor of Latin Language and Literature in the University of Michigan since 1889 (he was then only thirty-one years old, having been born May 23, 1858). But the translator of Grotius would need to be more than a Latinist—he must be a man of broad views and broad interests, in whom the humanities had produced an inexpressible culture from association with the great minds of antiquity. Only such a man could understand Grotius; only such a man could interpret his writings; only such a man could make Grotius speak in English to the readers of today.

The Editor of the series had long known Professor Kelsey. He had made his acquaintance under very agreeable circumstances. One day in the Department of State—of which Department the Editor was then Solicitor—Professor Kelsey requested his good offices in order that the Department of State should procure a permission which he and his humanistic friends had at heart. The permission was secured, and, with it, the friendship of Professor Kelsey.

The translation of Grotius was undertaken as a labor of love. Professor Kelsey hoped that he would be able to complete it with the assistance of his colleagues at the University, within the course of a twelvemonth, so that it might appear from the press at the time of the peace negotiations which were destined to take place in Paris, in 1918. But if it was a great undertaking to write the treatise in Latin, it was a very difficult one to translate it into a modern language. The Biblical adage, "Many are called but few are chosen," applies here if anywhere; and it must be said, also, that Professor Kelsey yielded more than once to the archeological urge, and that during the time when he might have pored over his Grotius, he was digging in Egypt and in the Carthage that was. It must also be admitted that the "by-products" of the translator are certainly not his least claim to remembrance. Grotius would have approved his activity in those far-off lands, although he might have suggested that Professor Kelsey take along, as a sort of companion, his own three books on the law of war and peace.

However, Professor Kelsey had a knack for doing many things at one and the same time. The translation progressed, and with the aid of his collaborators, like him members of the University Faculty: Professor Arthur E. R. Boak, Professor Henry A. Sanders, Professor Jesse S. Reeves; and Dr. Herbert F. Wright, of the Carnegie Endowment for International Peace, had reached completion.

The treatise of Grotius at last speaks English. The entire manuscript received Professor Kelsey's repeated revision, including the last one, which his questioning and scholarly mind felt that it should receive at his hands. It went to the Clarendon Press, at Oxford, England, in three volumes—one for each of the original books. A few copies of the first volume were received in this country in the early part of February, when Professor Kelsey was in Europe, and it is doubtful if the volume, the fruits of long and arduous labor on his part and on the part of his colleagues, ever reached him. In any event, he did not have the pleasure of reading the following letter from Amsterdam, under date of June 7th:

> The literary branch of the Royal Academy of Science at Amsterdam learned from her chairman, Professor van Vollenhoven, who presently is in the United States of America, that the first part of your new English translation of Hugo Grotius—"De Jure Belli ac Pacis"—has just been published. The literary branch begs to express to you and to your collaborators its sincerest [con]gratulations on this publication and expresses its conviction that a good new translation of Grotius'

> book of 1625 in the English language will prove to be not only of great use to scholars, but equally to those, who interest themselves in modern international organization or who occupy leading positions in that organization.

The letter was sent to the University of Michigan, and a copy of it forwarded to the Editor of the series. Professor Kelsey had died on May 14, 1927.

The Kelsey translation, which appropriately bears the names of his collaborators also, is not only "a good new translation of Grotius' book of 1625 in the English language;" it is, in the opinion of competent scholars who have examined it, scrupulously accurate, and, in the opinion of men of letters, a literary rendering of a Latin classic. And it is fair to say that it will, in the language of the Secretary of the Literary Branch of the Royal Academy of Science, of Amsterdam, "prove to be not only of great use to scholars, but equally to those, who interest themselves in modern international organization or who occupy leading positions in that organization."

The Editor of the *Classics of International Law* would like to think—and greater praise to Professor Kelsey and his colleagues he cannot give—that Grotius, himself, would have been pleased with the translation.

JAMES BROWN SCOTT.

INSTITUTE OF PACIFIC RELATIONS, 1927

The first meeting of the Institute of Pacific Relations was held at Honolulu in the summer of 1925. At that meeting of persons from Pacific countries there was frank discussion of problems of the Pacific, because no one was representing officially any state or organization. The program in 1925 was, after the preliminary meetings, left entirely to the members of the Institute, and the most controversial of the Pacific problems were frankly discussed. Naturally in 1925 there were discovered many respects in which the work of the Institute might be made more valuable, and it was decided that, profiting by the experience of the first session, the Institute should meet again after two years.

The second meeting of the Institute is to be held at Honolulu in the summer of 1927. The members have been chosen from the countries bordering on the Pacific in order to carry to the Institute so far as possible a composite of the points of view of all elements in each country. The number is limited by the necessity of free exchange of opinion and direct personal discussion. The members are to live together and sit at the same tables in college commons for two weeks. The president of a Japanese bank may have at table on his right for a day an American labor leader, and at his left a member of the New Zealand legislature, and the next day he may be between a British editor and a Chinese woman professor of history. Buddhists and Confucianists will confer with the Congregationalist and Catholic.

Preparations for the meeting of the Institute in the summer of 1927 have been made during the two years intervening since the first meeting. Researches upon problems on which data were lacking in 1925 have been made. Collections of material will be available. Specialists will present their points of view. General and round-table meetings will be held. The preliminary program for 1927 covers cultures, religions, educational and social institutions, resources, industries, commerce, finance, race, population, communications, political and legal institutions, international relations, immigration, race prejudice, and many other topics. Nothing relating to the Pacific is foreign to the Institute, and the aim is that no point of view shall be overlooked or suppressed.

GEORGE GRAFTON WILSON.

BASIS OF THE LAW AGAINST CONFISCATING FOREIGN-OWNED PROPERTY

An examination of the fundamental laws of all the nations which were belligerents in the Great War and of several important neutral Powers, which together include all of the elder members of the family of nations, discloses a profound respect among them for the sanctity of private property. Extracts from these fundamental laws are collected in an annex hereto, and in every instance the taking of private property in time of peace is prohibited unless for public uses and except upon the payment of adequate compensation, which in most cases must be paid before the property is taken.

A law so generally accepted as one of the basic principles in the constitutional organization of civilized states expresses the standard of right and justice which enlightened humanity has prescribed for itself in its domestic affairs.

The right of a state to take or destroy private property under the so-called police powers of the state, in the regulation of the morals, health and safety of the community, presents a fundamentally different question from the confiscation of private property as a national policy, whether communistic, or anti-foreign, or merely for mercenary purposes, which is the only aspect of the question now under consideration.

So also, in international relations, the same principle has controlled the action of all nations maintaining at least the minimum standard of justice demanded by the family of nations among its members, and through their adherence to this principle prohibiting the confiscation of foreign-owned property in time of peace, it has become firmly embedded in the law of nations.

Inasmuch as international law, unlike municipal law, is not subject to repeal by domestic legislation, no member of the family of nations may justify its repudiation of a principle of international law by applying a different principle in its domestic legislation. When a government seeks and receives recognition from other governments, as a member in good standing

of the family of nations, it assumes an honorable and binding obligation to observe in its foreign relations all the principles and rules of the law of nations.

It must be noted that this accepted principle, which safeguards foreign-owned property from confiscation in time of peace, has become part of the law of nations not merely because it represents a universally recognized standard of justice, but also because it is absolutely essential for the welfare of every nation, for without its protection no commercial, or financial international intercourse could safely be carried on.

Accordingly, the real basis for the adoption and enforcement of this protective principle in international relations is its appeal to enlightened public opinion, not alone on the ground of inherent justice, but also on account of reciprocal benefits. It derives its real authority and permanence from the universal need by all nations of foreign trade for their prosperity, and in the mutual benefits which nations receive through the investment of foreign capital for the development of national resources.

The investment of surplus capital in foreign countries goes hand in hand with this principle of international law prohibiting the confiscation of foreign-owned property, and all of the indispensable business of international trade and foreign investment will automatically cease whenever the protection of the correlative law of nations against the confiscation of foreign-owned property is repudiated.

This automatic reaction is well illustrated by the effect of recent legislation in Mexico upon the loaning of surplus American capital for investment there. According to recent statistics prepared by the Department of Commerce, Latin American loans, which have been publicly offered in the United States between 1919 and 1926, inclusive, amounted in the aggregate to more than $1,200,000,000. Of this amount approximately $900,000,000 represented loans to Latin American governments and municipalities, but not one dollar of this enormous total was loaned to Mexico. The remainder of this total aggregate, amounting to $300,000,000, represented loans to corporations operating in Latin America, and of this amount less than $20,000,000 was expended in Mexico, and all of the amount so expended was loaned to corporations operating under American charter or American control.

It is clear from these statistics that, from the point of view of surplus capital in the United States at least, and notwithstanding Mexican assurances to the contrary, the Mexican policy toward foreign-owned property in recent years has been interpreted as threatening the integrity of Mexico's international obligations, and accordingly American capital has avoided Mexico rather than risk the menace of confiscation.

CHANDLER P. ANDERSON.

Annex

EXTRACTS FROM CONSTITUTIONS AND LAWS

AUSTRIA

Fundamental Laws of 21 December, 1867

Law Concerning the General Rights of Citizens

Art. 5.—Property is inviolable. Forced expropriation shall take place only in the cases and according to the forms determined by law.

Austrian Civil Code

Section 365.—If the public welfare requires it a subject of the State must cede his entire right of ownership of a thing in exchange for adequate compensation.

BELGIUM

Constitution of 7 February, 1831

Title II.—Belgian Citizens and Their Rights

Art. 11.—No one may be deprived of his property except for a public purpose and according to the forms established by law, and in consideration of a just compensation previously determined.

BRAZIL

Constitution of 24 February, 1891

Title IV.—Brazilian Citizens

Section II.—Declaration of Rights

Section 17.—The rights of property shall be maintained in all their plenitude, except in cases of expropriation because of necessity or public utility, in which cases indemnity shall be made beforehand.

BULGARIA

Constitution of 16/18 April, 1879, with Amendments of 15/27, May, 1893, and 11/24 July, 1911

Chapter XII.—The Citizens of the Bulgarian Kingdom

Section 3.—The Right of Property

Art. 67.—The right of property is inviolable.

Art. 68.—Expropriation may take place only because of public utility and in consideration of a just indemnity. The mode of expropriation shall be determined by a special law.

CHINA

Provisional Constitution of 11 March, 1912

Chapter II.—Citizens

Art. 6.—Citizens shall enjoy the following rights:

* * * * *

3. Citizens shall enjoy the right of the security of their property and the freedom of trade.

COSTA RICA

Constitution of 8 June, 1917

Chapter II.—Individual Guarantees

Art. 15.—The right of property is inviolable, and no one shall be deprived of his property except by virtue of a judicial decree, and for reasons of public utility judicially declared, and after payment of the actual value of both the property and the resulting damages which may be proved, all as appraised by experts.

CUBA

CONSTITUTION OF 21 FEBRUARY, 1901

TITLE III.—Foreigners

ART. 10.—Foreigners residing within the territory of the Republic shall be on the same footing as Cubans:

1. In respect to protection of their persons and property.
2. In respect to the enjoyment of the rights guaranteed by Section I of the following title, excepting those exclusively reserved to citizens.

TITLE IV.—Rights Guaranteed by this Constitution

SECTION I.—Individual Rights

ART. 32.—No one shall be deprived of his property, except by competent authority, upon proof that the condemnation is required by public utility, and previous indemnification. If the indemnification is not previously paid, the courts shall protect the owners, and, if needed, restore to them the property.

ART. 33.—In no case shall the penalty of confiscation of property be imposed.

FRANCE

FRENCH CIVIL CODE

ART. 545.—No one can be compelled to cede his property except for reasons of public utility and upon previous payment of a just indemnity.

GERMANY

ARTICLE 153 OF THE CONSTITUTION

PARAGRAPH 2.—Expropriation may be effected for the purpose of the welfare of the Commonwealth and in accordance with law. In case of expropriation adequate compensation must be made unless a Federal law otherwise provides. In case of dispute regarding the amount of the compensation recourse may be had to the ordinary courts unless Federal laws otherwise provide. In case of expropriation by the Reich of property of states, municipalities, and organizations for public purposes, compensation must always be made.

PRUSSIAN NATIONAL LAW (ALLGEMEINES LANDRECHT)

SECTION 75 of the Introduction. On the other hand, the State is required to compensate the person who is forced to sacrifice his particular rights and advantages to the welfare of the commonwealth.

SECTIONS 8 and 9 of Title 11, Part I, of the same law. In all cases of compulsory sale in pursuance of law, where there is no agreement in regard to the price, the price must be determined in accordance with the judgment of appraisers appointed under oath.

For the purpose of such determination not only the common (market) value but also the special value must be considered.

GREAT BRITAIN

GREAT CHARTER OF LIBERTIES OF 11 FEBRUARY, 1225

ART. 29.—No free man shall be taken or imprisoned, or be dispossessed of his freehold or liberties or free customs, or be outlawed, or exiled, or in any other way destroyed.

STATUTUM DE TALLAGIO NON CONCEDENDO OF 1297

ART. 2.—No officer of ours or of our heirs shall take corn, wool, leather or any other goods of any manner of person without the good will and assent of the party to whom the goods belonged.

ATTORNEY GENERAL v. DEKEYSER'S HOTEL, 1920 A. C. 508

The conclusion, as I understand it, is this, that it does not appear that the Crown has ever taken for these purposes (defense of the realm) the land of the subject without paying for it, and there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative. [Opinion of Lord Atkinson.]

All British statutes which authorize the taking of property provide for the payment of compensation. See Lands Clauses Consolidation Act of 1845 (8 and 9 Vict. C. 18); The Railways Clauses Consolidation Act, 1845 (8 and 9 Vict. C. 20); The Waterworks Clauses Act, 1847 (10 and 11 Vict. C. 17); The Public Health Act, 1875 (38 and 39 Vict. C. 55); The Electric Lighting Act, 1882 (45 and 46 Vict. C. 56); The Housing of the Working Classes Act, 1890 (53 and 54 Vict. C. 70); The Metropolitan Paving Act, 1817 (57 Geo. 3, C. 29).

GREECE

CONSTITUTION OF 1/14 JUNE, 1911

The Public Rights of the Greeks

ART. 17.—No one may be deprived of his property except for the public benefit duly proven, when and as the law directs and always after indemnification. The indemnification is always fixed through the judicial channel. In case of urgency it may be provisionally fixed judicially after the beneficiary has been heard or summoned and the beneficiary may be obliged, at the discretion of the judge, to give a proportionate guarantee in the manner defined by law. Until the final or provisional indemnification fixed is paid, all the rights of the proprietor are maintained intact, dispossession not being permitted.

GUATEMALA

CONSTITUTION OF 11 DECEMBER, 1879

TITLE II.—Guarantees

ART. 28.—Property is inviolable; its expropriation shall only be ordered upon legal proof that the public interests are subserved thereby, and in this case the owner, before his property is seized, shall receive its just value in cash.

HAITI

CONSTITUTION OF 12 JUNE, 1918

TITLE II.—Haitians and Their Rights

SECTION II.—Public Law

ART. 14.—The right of property is guaranteed.

No one shall be deprived of his property except by reason of public utility, and in the cases and in the manner established by law, and upon previous payment of a just indemnity. Property shall not be confiscated for political reasons.

HONDURAS

CONSTITUTION OF 14 OCTOBER, 1894

TITLE V.—Rights and Guarantees

Property

ART. 67.—No one shall be deprived of his property except by virtue of a law or of a sentence founded on law. Expropriation, when necessary or for public utility, must be authorized by law or by a sentence founded on law, and shall not take place without previous compensation. In case of war previous compensation is not indispensable.

ITALY

Fundamental Statute of 4 March, 1848

The Rights and Duties of Citizens

Art. 29.—All property, without exception, is inviolable.

Nevertheless, when the public interest, legally ascertained, requires it, a person may be bound to give it up, in whole or in part, upon payment of a just indemnity in accordance with the law.

JAPAN

Constitution of 11 February, 1889

Chapter II.—Rights and Duties of Subjects

Art. 27.—The right of property of every Japanese subject shall remain inviolable.

LIBERIA

Constitution of 26 July, 1847, as Amended 7 May, 1907

Article I.—Bill of Rights

Section 8.—No person shall be deprived of life, liberty, property or privilege, but by judgment of his peers, or the law of the land.

Section 13.—Private property shall not be taken for public use without just compensation.

LIECHTENSTEIN

Constitution of 26 September, 1862

Chapter II.—The General Rights and Duties of Subjects

Art. 14.—Property or other rights and privileges may be demanded for purposes of the State or of a community only in the cases and forms prescribed by the law and in consideration of full indemnity, which must be paid previously.

Art. 16.—All confiscation of property is prohibited, but the confiscation of separate articles which have served or may serve as the tool or means of a crime or a violation is henceforth permitted.

LUXEMBURG

Constitution of 17 October, 1868

Chapter II.—The Luxemburgers and Their Rights

Art. 16.—No one shall be deprived of his property, except by reason of public utility, in the cases and in the manner established by the law and in consideration of a just and prior indemnity.

Art. 17.—The penalty of confiscation of property shall not be established.

MEXICO

Constitution of 1857

Art. 27.—Private property shall not be taken without the consent of the owner, except for reasons of public utility, indemnification having been made. The law shall determine the authority to make the expropriation and the conditions on which it shall be carried out.

Constitution of 1917

Art. 27.—The ownership of lands and waters comprised within the limits of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property.

Private property shall not be expropriated except for reasons of public utility and by means of indemnification.

MONTENEGRO

Constitution of 6/19 December, 1905

Part XIV.—The Constitutional Rights of Montenegrin Citizens

Art. 205.—The penalty of confiscation of property is forbidden; only those objects are liable to seizure which are the product of a punishable action, have served, or were destined to perpetrate this punishable act.

Art. 206.—Property of whatever character is inviolable.

Art. 207.—No one can be obliged to give his property for public needs; the right of property can be limited only in the cases permitted by the law in consideration of an indemnity.

NICARAGUA

Constitution of 10 November, 1911

Title VIII.—Rights and Guarantees

Art. 57.—No one can be deprived of his property except by virtue of a judgment rendered by a competent authority or by reason of public utility. The expropriation in the latter case must be specifically prescribed by law or by judgment based on the law, and shall not be carried out without previous indemnification.

In case of domestic or foreign war it is not necessary that this indemnification be previous.

NORWAY

Norwegian Constitution

Sec. 105.—If the welfare of the State requires that anyone should give up his personal or real property for public use, he ought to be fully compensated from the Exchequer.

PANAMA

Constitution of 13 February, 1904

Title III.—Individual Rights

Art. 42.—No one shall be deprived of his property, either in whole or in part, except as a penalty or by general taxation according to the laws.

For grave reasons of public utility, defined by law, condemnation of private property or of rights may be made by judicial order, but the payment of the declared value shall be made before the owner is dispossessed of them.

Art. 44.—In no case shall the penalty of confiscation of property be established by law.

PERSIA

Supplementary Constitutional Law of 7 October, 1907

Art. 6.—The life and property of foreigners resident in Persia are secured and guaranteed, except in those cases in which laws of the realm make exceptions.

Art. 9.—The life, property, domicile and honor of every individual is secured and guaranteed from every kind of injury. No one can be disturbed except by order of, and in the manner defined by, the laws of the land.

Art. 15.—No owner can be deprived of his land except by sanction of the Sheri, and then only after the fixing and payment of a just price.

Art. 16.—The sequestration of the property or possessions of any person as a penal measure is forbidden, except by order of law.

Art. 17.—It is forbidden to deprive owners or possessors of the properties or possessions controlled by them on any pretext whatever except by order of law.

PORTUGAL

Constitution of 21 August, 1911

Title II.—Individual Rights and Guarantees

Art. 3.—The Constitution guarantees to Portuguese and foreigners resident in the country the inviolability of their rights with regard to liberty, personal security and property, in the following terms:

23. No punishment shall extend beyond the person of the delinquent; in no case whatever shall there be confiscation of property, nor shall the infamy of the guilty party affect relatives in any degree.

25. The right of property is guaranteed within the limitations established by law.

ROUMANIA

Constitution of 30 June/12 July, 1866, as Amended 13/25 October, 1879, and 8/20 June, 1884

Title II.—The Rights of Roumanians

Art. 7, Sec. 5.—Roumanians, or those who are naturalized as Roumanians, may acquire real estate in Roumania.

Rights already acquired shall be respected.

Art. 11.—All aliens who are on the soil of Roumania enjoy the protection that the laws accord to persons and to property in general.

Art. 17.—No law can establish the confiscation of property.

Art. 19.—Property of every kind is sacred and inviolable, the same as all credits against the State.

No one can be dispossessed except for the purpose of public utility legally decided and after a just and previous indemnity.

By the purpose of public utility must be understood only public roads, public health and the works of defense of the country.

RUSSIA

Fundamental Laws of 23 April/6 May, 1906

Chapter II.—The Rights and Duties of Russian Subjects

Art. 35.—Property is inviolable. Expropriation of real property, when such is necessary for the public good or for the State, shall take place only for an equitable and adequate indemnification.

SERBIA

Constitution of 5/18 June, 1903

Part II.—The Constitutional Rights of Serbian Citizens

Art. 16.—Property of every kind is inviolable.

No one can be constrained to yield his goods to the State or to other public moral persons, nor to undergo any restriction in their favor, except in cases established by law and in consideration of a legal indemnity.

Art. 17.—The penalty of general confiscation of property is forbidden.

However, objects arising from a fraudulent source or objects having served or destined to serve in the accomplishment of a crime can be confiscated.

TURKEY

Constitution of 23 December, 1876, as Amended in 1909

Art. 21.—To everyone shall be assured the ownership of the real and personal property to which he has a regular title. The real property possessed by any person cannot be taken

unless the expropriation is proved to be necessary in the public interest and the value of the property is paid in advance according to the law.

ART. 24.—The confiscation of property, forced labor and exactions of money are forbidden.

UNITED STATES

CONSTITUTION OF 17 SEPTEMBER, 1787

Fifth Amendment

Nor shall private property be taken for public use without just compensation.

[The principle that foreign-owned private property cannot be taken by a government without compensation in time of peace has been invoked indirectly in many cases to enforce the obligation of a new government, in territory acquired by conquest or cession, to respect property rights and titles derived under the laws of the government previously in control.

The position of the United States on that application of this principle was well stated by Secretary of State Bayard in his letter of March 20, 1886, to the American Minister in Chile with reference to the Alsop claim against the Chilean Government. After citing authorities and decisions in support of the principle under discussion, he states our position as follows:

> The Government of the United States, therefore, holds that titles derived from a duly constituted prior foreign government to which it has succeeded are "consecrated by the law of nations" even as against titles claimed under its own subsequent laws. The rights of a resident neutral—having become fixed and vested by the law of the country—cannot be denied or injuriously affected by a change in the sovereignty or public control of that country by transfer to another government. His remedies may be affected by the change of sovereignty but his *rights* at the time of change must be measured and determined by the law under which he acquired them. War is between States, and forms of government may thus be changed, and laws are forms of government, but cannot act retroactively to destroy neutral rights. The government of the United States is therefore prepared to insist on the continued validity of such titles, as held by citizens of the United States, when attacked by foreign governments succeeding that by which they [were] granted. Title to land and landed improvements, is, by the law of nations, a continuous right, not subject to be divested by any retroactive legislation of new governments taking the place of that by which such title was lawfully granted. Of course it is not intended here to deny the prerogative of a conqueror to confiscate for political offences, or to withdraw franchises which by the law of nations can be withdrawn by governments for the time being. Such prerogatives have been conceded by the United States as well as by other members of the family of nations by which international law is constituted. What, however, is here denied is the right of any government to declare titles lawfully granted by its predecessor to be vacated because they could not have been lawfully granted if its own law had, at the time in question, prevailed. This pretension strikes at that principle of historical municipal continuity of governments which is at the basis of international law (Moore, International Law Digest, Vol. I, page 422; The Alsop Claim, United States *v.* Chile, Case of the United States, page 224).

See also the decisions of the Supreme Court of the United States in the following cases: United States *v.* Percheman (1833), 7 Peters 51, 86; United States *v.* Chaves, 159 U. S. 452, 457; Airhart *v.* Massieu, 98 U. S. 491; Dent *v.* Emmeger, 81 U. S. 308, 312; United States *v.* Repentigny, 72 U. S. 211; Townsend *v.* Greeley, 72 U. S. 326; United States *v.* Moreno, 68 U. S. 400; Leitsendorfer *v.* Webb, 61 U. S. 176; Soulard *v.* United States, 4 Peters (1830) 511; Mutual Assurance Society *v.* Watts, 1 Wheaton 279; and cases therein cited.—C. P. A.]

CURRENT NOTES

AN ANALYSIS OF THE BULGARIAN NATIONALITY LAW

The conclusion of the naturalization treaty between the United States and Bulgaria on November 23, 1923,[1] calls for at least a brief analysis of the Bulgarian Nationality Law.

The Bulgarian Nationality Law of 1880 provided that "Are considered Bulgarian subjects all those Turkish subjects who, at and after the time of the declaration of the war for the liberation of Bulgaria, had their domicile, or had been born, within the limits of the Bulgarian Principality." Nevertheless, because of the spurious provisions of the Treaty of Berlin of 1878, authors on international law, as well as foreign Powers[2] considered the territory of Bulgaria an integral part of the Turkish Empire and the Bulgarians still subjects of the Sultan. This situation was brought to a close by a rough and illegal proclamation of Prince Ferdinand on October 5, 1908, when, without any previous warning to the great Powers and without the previous consent of the National Assembly, he proclaimed Bulgaria an independent kingdom and assumed the title "Czar of the Bulgarians."

The present nationality laws of Bulgaria are embodied in Chapter XII of the Constitution of 1879[3] and in the Law of 1904, with their amendments up to date. For the interpretation of these laws and to supply their inadequacies one has to look to the administrative regulations, parliamentary discussions, and, especially, to the decisions of the Supreme Court of Cassation, which has, under Article 47 of the Law Concerning the Organization of the Courts, of December 19, 1898, to interpret these laws.

Chapter XII of the Bulgarian Constitution bears the heading, "The Citizens of the Bulgarian Kingdom." Article 54 provides—

> All persons born in Bulgaria and who have not adopted any other nationality, as well as those who are born in foreign countries of parents who are Bulgarian subjects, are considered subjects of the Bulgarian Kingdom.

In the Bulgarian laws the words "subject" ("podanik") and "citizen" ("grazhdanin") are used interchangeably as synonyms and as conveying the idea of membership of the Bulgarian State, and nothing else.

[1] U. S. Treaty Series, No. 684; Supplement to this JOURNAL, Vol. 18, p. 117.

[2] R. Calary de Lamazière, *Les Capitulations en Bulgarie*, p. 163.

[3] English text of the Bulgarian Constitution, as adopted in 1879, in British Parliamentary Papers, Turkey No. 8 (1878–1879), Vol. 80; also an abbreviation of it in Hertslet, The Map of Europe by Treaty, Vol. 4, p. 2866; English text of the Bulgarian Constitution in Wright, The Constitutions of the States at War, p. 87. English text of the Bulgarian Nationality Law of 1883, in British Foreign Office, Miscellaneous No. 3 (1893) and No. 3 (1895); also in Martens, *Nouveau Recueil Général de Traités, 2 serie 19*, p. 550.

Bulgarian nationality is acquired by birth, by marriage, and by naturalization. Bulgarian subjects or citizens by birth are:

(1) Those born in Bulgaria or in a foreign country by a Bulgarian;

(2) Those born in Bulgaria of unknown parents or parents of unknown nationality. An illegitimate child follows the nationality of the parents whose nationality is first made known by recognition of judgment;

(3) Those born in Bulgaria of an alien, presumably excluding children born in Bulgaria of foreign diplomats accredited to the Bulgarian Government.

With regard to this last class of persons, the law provides that they are Bulgarian subjects if at the time of their majority they are domiciled in Bulgaria. Yet practically every person born in Bulgaria is held to be a Bulgarian subject or citizen. So that both the law of the place of birth (*jus soli*) and the law of blood (*jus sanguinis*) form a part of the Bulgarian law.

Naturalization is conferred in Bulgaria by a king's decree ("ukase") on the representation of the Minister of Justice. The courts, however, have jurisdiction over cases of contested nationality.

Applications either for acquisition or repudiation of Bulgarian nationality must be made by the persons interested or by their attorneys in fact to the justice of the peace where they are domiciled or to the Bulgarian diplomatic representatives or consuls, if they reside abroad (Article 30 of the Law of 1904).

A foreigner who wishes to acquire Bulgarian nationality by naturalization must, in lieu of a declaration of intention, file an application with the Ministry of Justice for a permit to establish his permanent domicile within the kingdom. Bulgarian nationality is conferred upon an alien who is of Bulgarian extraction, or is married to a Bulgarian woman, or has rendered some meritorious service to the country, one year after granting him a permit of permanent domicile. Otherwise, Bulgarian nationality is granted to an alien after three years following the grant of permanent domicile. Bulgarian nationality may also be granted to an alien who has not obtained a permit of permanent domicile but who can prove ten years continuous residence within the country.

A naturalized alien enjoys all civil and political rights of a Bulgarian subject or citizen. Nevertheless he is not eligible to membership in the National Assembly or to any other *elective* public office during fifteen years after he obtains his naturalization. This period is shortened to ten years for those aliens, specified in Article 9 (3) of the Nationality Law, who have obtained or shall obtain their naturalization by virtue of rendering some meritorious service to the country. And persons who recover Bulgarian nationality after having lost it immediately acquire all civil and political rights, including eligibility to any elective public office.

Every alien woman who marries a Bulgarian becomes *ipso facto* a Bul-

garian.[4] On the other hand, a Bulgarian woman who marries an alien acquires his nationality unless the law of the country to which he is considered a national provides that she shall not acquire its nationality by virtue of the marriage alone. After the termination of the marital relation, she may resume Bulgarian nationality by filing an application with the Ministry of Justice and by returning to the kingdom. Her minor children may, if the marital relation terminates with the death of the husband, acquire Bulgarian nationality by the same application and the same king's decree by which their mother resumes her nationality, if their names be included therein, or by a subsequent application and decree.

By reason of the concurrent operation of the *jus soli* and the *jus sanguinis*, there are persons born with dual nationality. Those persons born in Bulgaria of an alien, except the children of accredited foreign diplomatic representatives, are said to possess double nationality. They may, during the year following their majority, claim the nationality of their father, provided they produce, first, a certificate of the government of the country to which they claim to belong supporting such a claim; and, second, another certificate, if necessary, from the same government showing that they have responded to the military call of the country or that they are not subject to military service.

There is no provision in the laws concerning those born of Bulgarians in a foreign country and who are considered Bulgarians *jure sanguinis*. It seems that they also must *formally* repudiate Bulgarian nationality should they desire to be exempted from regular labor service in Bulgaria. It is the same with minor children of a naturalized Bulgarian or of a Bulgarian who reacquires Bulgarian nationality after having lost it, but not later than a year following their majority.

Under the Bulgarian law the right of expatriation or change of nationality is conditional. No Bulgarian can change his nationality when Bulgaria is at war; nor can a Bulgarian acquire foreign nationality while he is a resident within Bulgaria, without the permission of the Bulgarian Government; nor is a Bulgarian naturalized abroad divested of Bulgarian nationality, had he not served his period of compulsory labor service. Thus the Labor Law of 1920 provides

> Art. I. All Bulgarian citizens of both sexes, *viz.*, men who have attained the age of twenty years and girls who have attained the age of sixteen years, shall be liable to compulsory labor service, that is, to compulsory public service.
>
> Art. 5. No Bulgarian can change his nationality or settle in a foreign country until he has completed his compulsory labor service.
>
> Art. 24. Those persons who have acquired foreign nationality with-

[4] An American woman who marries a Bulgarian becomes *ipso facto* a Bulgarian, although she may retain her American nationality and thus becomes a person with dual nationality. A Bulgarian woman who marries an American retains her Bulgarian nationality until after she be naturalized as an American.

> out having previously served their compulsory labor, shall be punished with not less than one year of imprisonment.
>
> Art. 29. Offenses under the present law shall be cognizant to the proper District Courts as the courts of first instance. Cases arising under the operation of the present law are urgent and shall be tried within the course of a month.

Moreover, every Bulgarian naturalized abroad is responsible for offenses committed before the date of his naturalization. And it is necessary to mention that naturalization abroad must be obtained by a Bulgarian at his own voluntary application.

Of course the naturalization treaty between the United States and Bulgaria divests of Bulgarian nationality those Bulgarians who had been or have been or shall be naturalized in the United States. They are not and shall not be subject to punishment for the original act of emigration; but they are and shall be (Art. II of the treaty and Art. 24 of the Labor Law quoted above) liable to punishment in case they obtain naturalization (the second paper) after their labor service had accrued, that is, after they have completed twenty years of age.

Finally Article 158 of the Treaty of Neuilly of November 27, 1919, provides:

> Bulgaria undertakes to recognize any new nationality which has been and may be acquired by her nationals under the laws of the Allied and Associated Powers and in accordance with the decisions of the competent authorities of the Powers pursuant to naturalization laws or under treaty stipulations, and to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin.

The United States of America has, of course, nothing to do with the Treaty of Neuilly, since it has not ratified that treaty. Its provision regarding nationality and naturalization is quoted above simply in passing, because it is a part of the Bulgarian law as far as the other Allied and Associated Powers are concerned.

THEODORE GESHKOFF.

ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law held its twenty-first annual meeting in Washington, April 28–30, 1927, according to the program published in the last number of the JOURNAL. The presidential address of the Honorable Charles Evans Hughes, who opened the meeting on the evening of the 28th, attracted widespread attention in the press. Mr. Hughes forcibly and convincingly urged the immediate limitation of provocative armaments, proposed another great international conference to carry forward the work of the Hague conferences by stating and improving the rules applicable to the use of new agencies of warfare, and hoped for the adoption by the

League of Nations of the rule of unanimity in requests for advisory opinions so as to enable the United States to adhere to the protocol of signature of the statute of the Permanent Court of International Justice. Dr. Alexander Pearce Higgins, Whewell Professor of International Law at Cambridge University, followed Mr. Hughes with a paper on the duties of states, in which he suggested that an "emphasis on the duty of states rather than on their rights may lead to a better understanding between states and a juster application of the rules of international law."

The morning and afternoon sessions on Friday the 29th were devoted to a round table conference on the responsibility of states for damage done in their territories to the person or property of foreigners, presided over by Professor Edwin M. Borchard of Yale University Law School. The discussion of the sub-topic "Denial of justice" was opened by Professor Amos S. Hershey, of Indiana University, and Mr. Charles Pergler, former Minister of Czechoslovakia to Japan; that on "Confiscation" was opened by Professor Philip C. Jessup, of Columbia University; and that on "Riots and civil disorder" by Professor James W. Garner, of the University of Illinois, Professor Hobart R. Coffey, of the University of Michigan, and Mr. Clyde Eagleton, of New York University. Animated and interesting discussions followed the reading of the papers on each of these topics.

At the session on Friday evening, April 29th, at which President Hughes again presided, Mr. Frank E. Hinckley, lecturer on international law at the University of California, read a paper in which he advocated "Consular authority in China by new treaty." He was followed by Mr. Albert H. Putney, Director of the School of Political Science of American University, and Professor Raymond L. Buell, of Harvard University, who spoke on the termination of unequal treaties. These addresses were also followed by general discussion in which a number of members took part. The members who had not had an opportunity to discuss the papers because of the lack of time at the preceding sessions were given the chance to do so on Saturday morning, which was kept free on the program for this purpose.

After the discussions ended, the Society proceeded to transact necessary business. Dr. Max Huber, of Switzerland, was elected an honorary member of the Society. The Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law was continued and its powers enlarged to include any recommendation it may see fit to make in connection with the subject of the codification of international law. The Honorable Charles Evans Hughes was reelected President, and the Honorable Elihu Root Honorary President. Honorable John W. Davis and Judge William W. Morrow were added to the list of Honorary Vice-Presidents to fill vacancies, and Messrs. Chandler P. Anderson, David Jayne Hill, and James Brown Scott were reelected Vice-Presidents. A new class of eight members to serve on the Executive Council until 1930 was chosen, and a resolution was adopted authorizing a committee of the

Board of Editors of the AMERICAN JOURNAL OF INTERNATIONAL LAW to confer with publishers and with the Carnegie Endowment for International Peace in regard to the possible publication of the decisions of municipal courts in matters of public international law. Brief eulogies were delivered on the services of the Honorable Simeon E. Baldwin, the Honorable Oscar S. Straus, and Dr. Harry Pratt Judson, honorary vice-presidents who had died during the preceding year. Other officers and committees were elected for the ensuing year at the meeting of the Executive Council which took place immediately upon the adjournment of the Society Saturday morning, the incumbents being for the most part reelected. At the banquet on Saturday evening, which closed the meeting, Mr. Hughes presided as toastmaster, and the speakers were the Honorable Vincent Massey, Minister of Canada, Frederic R. Coudert, Esquire, of the New York Bar, and the Honorable Irvine L. Lenroot, former United States Senator.

The complete report of the addresses, discussions, and remarks, including the dinner, has been printed in the usual volume of annual proceedings and is ready for distribution. The subscription price is $1.50.

PEACE IN NICARAGUA [1]

On April 7, 1927, the Honorable Henry L. Stimson, formerly Secretary of War, was sent as the representative of President Coolidge to Nicaragua to make an effort to compose the differences between the contending factions which have torn that unhappy country since the *coup d'état* of General Emiliano Chamorro on October 25, 1925, which resulted in the forced resignation of President Solorzano and the assumption of the executive power by General Chamorro on January 17, 1926, the refusal of the United States to recognize General Chamorro's government on January 25, 1926, the suppression by General Chamorro of the armed opposition led by the Liberal Vice-President Sacasa in May, 1926, and recognition of President Adolfo Diaz by the United States on November 17, 1926. As the result of his efforts, made in conjunction with the American Minister, Mr. Eberhardt, and the American Admiral Latimer, Mr. Stimson was able to report on May 15th that the civil war was definitely ended.

In a statement made public upon his return to Washington on May 23rd, Mr. Stimson described the conditions in Nicaragua as he found them as follows:

> I doubt if the people of this country have appreciated the bitterness of the strife and the horrors of the conditions which have existed during the revolution in Nicaragua. Not only has the actual fighting been so fierce that in many battles the losses of the combatants, in proportion to their number, have been as high as the losses in the Great War, but the conduct of the warfare has been brutal beyond expression. When I reached Nicaragua I found that no prisoners were being taken by either side. The wounded when captured were killed, and even when

[1] State Department press notices, April 7–June 10, 1927.

> not captured most of them fell victims to the hardships of the climate and the jungle in which the fighting took place. Cases were brought to my attention where non-combatants, men, women and children, were butchered in cold blood, and also cases where such non-combatants were tortured and mutilated. Furthermore, the country was rapidly drifting into anarchy, and was becoming filled up with armed men, who had formerly been in one army or the other and who were choosing the easier course of becoming bandits.

This deplorable situation was ended through a series of frank discussions with representatives of the contending forces. On May 4th both sides were persuaded to make a truce pending conferences for peace. In the negotiations the Liberal representatives urged the immediate substitution of some other man for President Diaz, but Mr. Stimson reported that in the existing crisis "no neutral or impartial Nicaraguan exists," and that "any attempt by the Nicaraguan Congress to elect a substitute for Diaz under the forms of Nicaraguan law would almost certainly become the occasion of further bitter factional strife." It was, therefore, essential that President Diaz be retained during the remainder of his term; but even if the Liberals were constrained to agree to his continuance in power until the election of 1928, they pointed to the lack of what they would consider effective guarantees for a fair election when held. Mr. Stimson found this distrust of the fairness of elections as the fundamental factor in the situation. "My investigation has shown," he says, "that this evil of government domination of elections lies, and has always lain, at the root of the Nicaraguan problem. Owing to the fact that a government once in power habitually perpetuates itself, or its party, in such power by controlling the election, revolutions have become inevitable and chronic, for by revolution alone can a party once in control of the government be dispossessed." He reported further that "All persons of every party with whom I have talked admit the existence of this evil and its inevitable results, and all of them have expressed an earnest desire for the supervision of election by the United States in an attempt to get rid of the evil forever."

President Diaz proposed the creation by Nicaraguan law of an electoral commission to be controlled by Americans nominated by the President of the United States, and Mr. Stimson was able to inform General Moncada, commander of the revolutionary forces in the field, that the President of the United States intended to accept the request of the Nicaraguan Government to supervise the elections of 1928. On the basis of this assurance, a program of conciliation and reconstruction was arranged as follows:

(1) Complete disarmament on both sides by delivering up their arms to the American Marine forces, General Moncada to be given by the Nicaraguan Government certain supplies and clothing and ten dollars for each rifle and machine gun turned over;

(2) An immediate general peace to permit planting for the new crop in June;

(3) A general amnesty to all persons in rebellion or exile;

(4) The return of all occupied or confiscated property to its owners;

(5) Participation in the Diaz cabinet by representative Liberals, which was declined by the Sacasa delegates, but who assured Mr. Stimson that the Liberals would coöperate in congressional by-elections in certain districts and would also accept positions necessary for holding the 1928 elections or necessary for the future reconstruction of the country;

(6) The organization of a Nicaraguan constabulary on a non-partisan basis, commanded by American officers;

(7) American supervision of the 1928 election;

(8) The continuance temporarily in the country of a sufficient force of American marines to guaranty order pending the organization of the constabulary.

The delivery of their arms by the revolutionary and governmental forces began on May 13th, and when it ended on June 6th, Admiral Latimer reported that all arms in Nicaragua were in the custody of the American forces except a few possessed by individuals or small roving bands. Mr. Stimson reported that the troops on both sides after giving up their arms hastened to their homes so as to be in time for the planting of this year's crops and the resumption of their peace time occupations; that an amnesty was declared before the troops were disarmed; that pledges have been given to restore the courts and the Congress to the status existing before the Chamorro *coup d'état;* and that there was promised the appointment of Liberal local officials in the Liberal provinces. Admiral Latimer reported later that five Liberal governors had been named.

Mr. Simpson left Nicaragua on May 16th bringing with him the formal request of the government for American supervision at the 1928 elections. On July 2nd [2] President Coolidge announced the nomination of General Frank R. McCoy, United States Army, to be chairman of the Nicaraguan electoral commission in 1928. General McCoy was four years in Cuba and four years in the Philippines as assistant to General Wood. He will leave for Nicaragua in August to make a preliminary study of conditions.

PAYMENT OF AMERICAN SHARE OF THE DAWES ANNUITIES [1]

The Government of the United States and the German Government have concluded an arrangement providing for the realization by the United States of its 2¼ per cent share in German payments under the Dawes Plan. This arrangement was embodied in notes exchanged between the American Ambassador at Berlin and the German Foreign Office on December 8, 1926.

The arrangement provides a method of converting into dollars the sums which accrue in German marks to the credit of the United States in the account of the Agent General for Reparation Payments at the Reichsbank in

[2] New York Times, July 3, 1927, p. 6.

[1] State Department press notice, Feb. 5, 1927.

Berlin. German firms will arrange, through the agency of the Reichsbank, to deposit monthly with the Federal Reserve Bank of New York certain sums in dollars arising from their dealings in the United States. These deposits will correspond in each month to the credit accruing to the United States in that month in marks in Germany. The German firms, in turn, will be reimbursed with the above-mentioned marks at the prevailing rate of exchange.

The present procedure does not apply to the army cost payments to the United States out of the German payments under the Dawes Plan. American army costs are now being repaid at the rate of 55,000,000 marks (about $13,000,000) yearly, and payments are being made in dollars by the Agent General.

The total sum in marks accruing to the United States in respect of its 2¼ per cent share during the first two years of the operation of the Dawes Plan, that is, up to August 31, 1926, amounted to approximately 35,000,000 marks, equivalent to about $8,400,000. That sum has already been converted into dollars, partly by means of interim arrangements similar to that now concluded, and partly from the proceeds of a cash transfer effected by the Agent General in August, 1926.

The 2¼ per cent share of the United States during the current reparation year ending August 31, 1927, amounts to about 24,189,000 marks, or approximately $5,800,000. In a "normal year," that is, after September 1, 1928, the share of the United States will be 45,000,000 marks, equivalent to about $10,700,000 annually.

WAR CLAIMS SETTLED BY GREAT BRITAIN AND THE UNITED STATES [1]

By an exchange of notes on May 19, 1927, the Secretary of State and the British Ambassador at Washington put into effect the following agreement disposing of certain unadjusted pecuniary claims arising out of the World War in which the two governments were interested either as principals or on behalf of their respective nationals:

ARTICLE I

With the exceptions stated in Article II hereof His Majesty's Government in Great Britain and the Government of the United States agree:

(1) That neither will make further claim against the other on account of supplies furnished, services rendered or damages sustained by it in connection with the prosecution of the recent war, all such accounts to be regarded as definitively closed and settled.

(2) That neither will present any diplomatic claim or request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by the other, any such national to be referred for remedy to the appropriate judicial or administrative tribunal of the government against which the claim is alleged to lie, and the decision of such tribunal or of the appellate tribunal, if any, to be

[1] State Department press notice, May 31, 1927.

regarded as the final settlement of such claim, it being understood that each government will use its best endeavors to secure to the nationals of the other the same rights and remedies as may be enjoyed by its own nationals in similar circumstances, and that His Majesty's Government in Great Britain agrees that fullest access to British prize courts shall remain open to claimants subject to the right of the British authorities to plead any defences that may be legally open to them.

(3) That the right of each government to maintain in the future such position as it may deem appropriate with respect to the legality or illegality under international law of measures such as those giving rise to claims covered by the immediately preceding paragraph is fully reserved, it being specifically understood that the juridical position of neither government is prejudiced by the present agreement.

ARTICLE II

Nothing contained in this agreement shall be construed to annul, alter, modify or in any way affect the rights of nationals of either government or to prevent the presentation of diplomatic claims based thereon, in respect of:

(1) The user of inventions by the other government in connection with its prosecution of the war;

(2) Damage caused by or salvage services rendered to a vessel belonging to the other government.

It is expressly understood that the provisions of this agreement do not apply to (1) Claims by the Government of the United States, or of its nationals, against the Government of any of His Majesty's self-governing Dominions or of India, or British nationals resident therein, or to claims against the Government of the United States by the Government of any of His Majesty's self-governing Dominions or of India, or by British nationals resident therein, and (2) Claims on behalf of either government or its nationals for the release of property held by Custodians of Enemy Property in Great Britain and Northern Ireland and all British Colonies and Protectorates, and by the Alien Property Custodian or the Treasurer of the United States.

The notes embodying the agreement stated that it is regarded "not as a financial settlement but as the friendly composition of conflicting points of view which seemed to lend themselves to no other form of adjustment," and that in these circumstances the agreement "will be construed by both governments with full regard for the equities of all parties concerned."

As interpretative of the arrangement, the notes stated that "by the terms of the agreement His Majesty's Government waive their right to receive a net cash payment on account of certain claims recognized by the United States as just and proper, and also their right to press certain other claims liability for which has not been formally admitted by the United States Government but which involve considerable amounts," and that the United States Government agrees to "regard the net amount saved to it through the above-mentioned waiver by His Majesty's Government . . . as intended for the satisfaction of those claims of American nationals falling within the scope of paragraph (2) of Article I of the agreement, which the Government

of the United States regards as meritorious and in which the claimants have exhausted their legal remedies in British courts, in which no legal remedy is open to them, or in respect of which for other reasons the equitable construction of the present agreement calls for a settlement." The Government of the United States assures the British Government that it will "recommend such action by Congress as will insure the utilization for the purpose just mentioned of the sums saved to the United States under the provisions of the present agreement, and that it will also safeguard His Majesty's Government against possible double liability by exacting an assignment to the Government of the United States of all of a claimant's rights and interests in the claim in question as a condition precedent to the allowance of any compensation in respect thereof."

Finally, the notes state that "since it appears that British subjects with claims against the Government of the United States which do not fall within the scope of the agreement above quoted do not enjoy rights of access to American judicial or administrative tribunals as complete or effective as are enjoyed in similar cases by American citizens seeking remedy against His Majesty's Government in Great Britain," the Government of the United States extends to such British claimants "the assurance contained in paragraph (2) of Article I of the said agreement, that is to say, that the Government of the United States will use its best efforts to secure to British nationals the same rights and remedies as may be enjoyed by its own nationals in similar circumstances and that in such cases the Department of State will give active support to a request to the Congress for appropriate remedial legislation."

COPYRIGHT BETWEEN CZECHOSLOVAKIA AND THE UNITED STATES [1]

The United States and Czechoslovakia have entered into a reciprocal copyright arrangement whereby the benefits of the Czechoslovakian copyright law of November 24, 1926, are extended to citizens of the United States, and the benefits of the copyright laws of the United States are extended to the citizens of the Republic of Czechoslovakia as from March 1, 1927.

The arrangement was effected by a proclamation of the Government of Czechoslovakia issued on April 27, 1927, in accordance with Section 2 of the Czechoslovakian copyright law of November 24, 1926, and the proclamation by the President was issued on April 27, 1927, pursuant to the provisions of Section 8 of the Act of Congress approved March 4, 1909, relating to copyright.

[1] State Department press notice, April 30, 1927.

CARNEGIE ENDOWMENT FELLOWSHIP IN INTERNATIONAL LAW

The Division of International Law of the Carnegie Endowment for International Peace has announced the successful candidates for its fellowships in international law for the academic year 1927–1928 as follows:

CLAUDE ALBERT BUSS, Ph.D. Mr. Buss was appointed from the University of Pennsylvania where he was an instructor of political science. He will study in Paris at the *Institut des Hautes Études Internationales*, and *École libre des Sciences politiques*.

JAMES WATSON GANTENBEIN, LL.B., A.M. Mr. Gantenbein was appointed while studying in France. Under the Fellowship he intends to study at Cambridge, England.

WILLIAM H. HESSLER, M.A., professor of economics and sociology at the University of Dubuque, will probably study at the University of Madrid.

JOHN IMMANUEL KNUDSON, Ph.D. Mr. Knudson was appointed from Franklin College, Franklin, Indiana, where he was head of the history department. He was at the time on leave of absence working on his doctorate at Indiana University. He will study at the University of Geneva.

JOHN BROWN MASON, A.M., a graduate student and assistant in modern European history at the University of Wisconsin. He will study at Columbia University.

MISS PHOEBE MORRISON, LL.B. Miss Morrison was appointed from George Washington University. She will study at Yale University Law School.

LLEWELLYN ERNEST PFANKUCHEN, A.M. Mr. Pfankuchen was appointed from Harvard University and plans to continue his studies there.

WILLIS GEORGE SWARTZ, M.A., professor of history and political science in Sterling College, Sterling, Kansas. He will study at Clark University.

DAVID WALTER WAINHOUSE, LL.B. Mr. Wainhouse was granted the Fellowship while a student at Harvard Law School and instructor in history and government at Tufts College. His studies under the Fellowship will be pursued either in Paris or Cambridge, England.

HUA-CHENG WANG, B.A. Mr. Wang was appointed from the University of Chicago while doing graduate work in political science. Mr. Wang plans to study at Harvard University.

MISS MARJORIE MILLAGE WHITMAN, LL.B. Miss Whitman was appointed to the Fellowship from Yale Law School, where she is planning to continue her studies.

KISABURO YOKOTA, M.A. Mr. Yokota, assistant professor in the Imperial University at Tokyo, was studying international law in France on leave of absence when he was awarded the Fellowship. His studies under the fellowship will be pursued at the Universities of Berlin and Harvard.

The academic year 1927–1928 will mark the eleventh consecutive year in which the Endowment has awarded fellowships to students and teachers of international law and related subjects, and the growing popularity of the

grants is evidenced by the large number of applications. Among the 124 applications considered by the Committee this spring no less than 17 countries were represented.

These fellowships, which carry a stipend of from $1000 to $1800, have been established by the Endowment for the purpose of improving the instruction in international law and related subjects by furnishing to teachers and intending teachers of those subjects opportunities for more advanced studies than they would otherwise be able to afford. Detailed information concerning them can be procured by addressing the Committee on International Law Fellowships, 2 Jackson Place, Washington, D. C.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16, 1927–MAY 15, 1927

(With references to earlier events not previously noted)

WITH REFERENCES

Abbreviations: *C. A. P.*, Collection of Advisory Opinions of Permanent Court of International Justice; *C. J.*, Collection of Judgments of the Permanent Court of International Justice; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Cur. Hist.*, Current History (New York Times); *E. E. P. S.*, European Economic and Political Survey; *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *G. B. Treaty Series*, Great Britain, Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Official (France); *L. N. M. S.* League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series; *Nation* (*N. Y.*); *N. Y. Times*, New York Times; *P. A. U.*, Pan American Union Bulletin; *Press Notice*, U. S. State Dept. press notice; *Rev. int. de la Croix-Rouge*, Revue international de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

August, 1926

25 FRANCE—SIAM. Treaty signed at Bangkok, supplementary to convention of Feb. 14, 1925. Text: *Europe*, Mar. 5, 1927, p. 315.

October, 1926

21 ARABIAN FRIENDSHIP TREATY. "Treaty of Mecca the Blessed" signed by the King of Hejaz and Sultan of Nejd and its dependencies, of the one part, and the Imam of the Asir of the other part. Text: *B. of int. news*, Mar. 7, 1927, p. 11; *Daily telegraph* (London), Jan. 28, 1927.

22 *to Dec. 1* GERMANY—LATVIA. Most-favored-nation commercial treaty signed June 28, 1926, ratified by Latvia on Oct. 22, and by Germany on Dec. 1. *Commerce Reports*, Jan. 3, 1927, p. 51.

November, 1926

9 ITALY—YEMEN (Arabia). Signed treaty of friendship and economic relations at Rome. *Commerce Reports*, April 4, 1927, p. 52.

12 BRAZIL—URUGUAY. Supplementary protocol to extradition treaty of Dec. 7, 1921, promulgated by Uruguay. *D. O.* (Uruguay), Nov. 22, 1926. *P. A. U.*, April, 1927, p. 405.

December, 1926

1 CUBA—UNITED STATES. Exchanged ratifications of consular convention signed at Havana, April 22, 1926. *U. S. Treaty Series*, no. 750.

4 FRANCE—VATICAN. Signed treaty regulating honors to be rendered to French representatives in the Near East, the Balkans and the Orient. Text: *N. Y. Times*, Dec. 7, 1926, p. 10. *Europe*, Feb. 26, 1927, p. 285.

18 GREAT BRITAIN—HEJAZ. Agreement signed on behalf of Sudan and Hejaz Governments relating to Port Sudan-Jeddah telegraph cable. *G. B. Treaty Series*, no. 11 (1927), *Cmd.* 2845.

22 NORWAY—POLAND. Signed most-favored-nation commercial treaty. *Commerce Reports*, April 11, 1927, p. 122.

31 GREAT BRITAIN—PORTUGAL. Agreement for settlement of war debt of Portugal to Great Britain signed at London. Text: *E. E. P. S.*, Feb. 15, 1927, p. 286. *Cmd.* 2791.

January, 1927

5–12 COMMITTEE ON DOUBLE TAXATION AND TAX EVASION. (League of Nations.) Met at Geneva. *L. N. M. S.*, Feb., 1927, p. 7.

12 BULGARIA—POLAND. Exchanged ratifications of provisional most-favored-nation commercial agreement signed April 29, 1925. *Commerce Reports*, April 4, 1927, p. 52.

12 GERMANY—TURKEY. Most-favored-nation commercial treaty signed at Angora. *Commerce Reports*, Mar. 28, 1927, p. 827.

27 COMMITTEE ON EXECUTION OF ARBITRAL AWARDS. (League of Nations.) Held first session at Geneva to consider possibility of framing a draft agreement to complete the Protocol of 1923 concerning arbitration clauses in commercial contracts. *L. N. M. S.*, Feb., 1927, p. 6. Second session held March 28. *L. N. M. S.*, April 15, 1927, p. 65.

February, 1927

2 BULGARIA—GREECE. Provisional commercial agreement signed at Athens. *Commerce Reports*, May 9, 1927, p. 375.

2 GREAT BRITAIN—SIAM. Exchanged ratifications of arbitration convention signed at London Nov. 25, 1925. *G. B. Treaty Series*, no. 7 (1927), *Cmd.* 2813.

5 ESTONIA—LATVIA. Treaty of execution of customs union between the two countries signed at Riga on Feb. 5, 1927. Text: *Europe*, March 19, 1927, p. 379. Ratified by both parliaments on April 8. *Commerce Reports*, April 18, 1927, p. 181. *J. Royal inst. int. aff.*, March, 1927, p. 130.

8 CHILE—NORWAY. Commercial and shipping treaty signed. *Commerce Reports*, March 21, 1927, p. 756.

8 CHINA. British Government sent statement to League of Nations on British policy in China. Partial text: *L. N. M. S.*, March 15, 1927, p. 48.

15 *to April 4* NAVAL DISARMAMENT CONFERENCE. In response to President Coolidge's appeal of Feb. 10, 1927, for a five-power conference on limitation of naval armaments, France declined to attend, in note dated Feb. 15; Japan accepted the proposal on Feb. 19; Italy rejected it on Feb. 21; Great Britain accepted the offer on Feb. 28. Texts: *U. S. Daily*, Feb. 16, 21, 23, 28, 1927. *E. E. P. S.*, Feb. 28, 1927, p. 314. After informal conversations, the United States sent formal notes, on March 11, to British and Japanese Ambassadors suggesting that a three-power conference be held at Geneva on June 1. Text: *U. S. Daily*, Mar. 14, 1927. On Mar. 14, memoranda were handed by American Ambassadors at Paris and Rome to the French and Italian Governments inviting them to send observers to the three-power conference. Text: *U. S. Daily*, Mar. 16, 1927. On April 4, France declined to be represented in any fashion. Text: *U. S. Daily*, April 6, 1927. Texts of all notes: *E. E. P. S.*, April 30, 1927, p. 528.

15 PERMANENT COURT OF INTERNATIONAL JUSTICE. Agents for Belgian Government advised Court Registrar of agreement between Belgium and China regarding protection to Belgian subjects, etc., and asked revocation of court order of Jan. 8, 1927, which was granted on Feb. 15. Turkey filed declaration in Lotus case, dated Jan. 24, 1927. Time extended in case concerning competence of European Commission of the Danube. German Government instituted proceedings against Poland in Chorzow factory case. *L. N. M. S.*, Mar. 15, 1927, p. 36.

16 CZECHOSLOVAKIA—SPAIN. Most-favored-nation commercial treaty signed. *Commerce Reports*, March 7, 1927, p. 634.

16 FRANCE—GERMANY. Protocol signed at Paris prolonging until May 31 the preliminary trade agreement and the separate Saar agreement. Text: *J. O.*, March 16, 1927, p. 2994.

16 *to March 5* MEXICO—UNITED STATES. Data on American investments in Mexico and their relations to Mexican land and petroleum laws, supplied to United States Senate by State Department on Feb. 16 in response to S. Res. 330. Text: *U. S. Daily*, Feb. 17, 1927, p. 1. On March 1, Mexican Embassy in Washington made public statistics on oil lands held by foreign companies. Text: *U. S. Daily*, March 2, 1927, p. 2. Oral statement made by State Department concerning recent exchanges of notes regarding property seizure in the case of Howard T. Oliver. *U. S. Daily*, March 7, 1927, p. 2.

17–21 FRANCE—GREAT BRITAIN. Exchanged notes regarding amendments to new Hebrides protocol of Aug. 6, 1914. *G. B. Treaty Series*, no. 8 (1927), *Cmd.* 2829.

17 GENERAL CLAIMS COMMISSION (United States and Mexico) S. Res. 352, requesting the President to negotiate and conclude an agreement with Mexico for extension of life of commission beyond Aug. 30, 1927, agreed to in the Senate of the United States. Text of resolution: *Cong. Rec.*, Feb. 17, 1927, p. 4001.

17 TURKEY—UNITED STATES. Agreement to establish diplomatic and consular relations, based on principles of international law, arranged by exchange of notes, pending action by the United States Senate on the Lausanne Treaty. Text: *U. S. Daily*, Mar. 15, 1927, p. 1. *N. Y. Times*, Mar. 15, p. 6. *Press notice*, Mar. 14, 1927.

19 CHINA—GREAT BRITAIN. Signed agreement providing that administration of concession at Hankow would pass from control of British Municipal Council to the new Council in which Chinese would have casting vote. *Times*, Feb. 22, 1927, p. 14.

20 ESTONIA—POLAND. Signed most-favored-nation commercial treaty at Tallin. *Commerce Reports*, May 16, 1927, p. 439.

20 GREAT BRITAIN—UNITED STATES. Correspondence relative to negotiation of ship liquor treaty and to further measures of cooperation, dated June 26, 1922—July 27, 1926, made public. Text: *Press notice*, Feb. 16, 1927.

20 GREAT BRITAIN—UNITED STATES. Correspondence relative to seizure of British hovering vessels outside the three-mile limit, dated Dec. 30, 1922-July 16, 1923, made public. Text: *Press notice*, Feb. 16, 1927.

20 THREE-MILE LIMIT. Department of State made public complete texts of 24 notes and memoranda exchanged with Great Britain, Italy, Belgium, Netherlands, Norway, Portugal, Sweden and Denmark, between June 26, 1922 and July, 1926, regarding seizure of foreign ships carrying liquor beyond the three-mile-limit, etc. *Press notice*, Feb. 16, 1927. *U. S. Daily*, Feb. 21–26, 1927.

21 CHINA—UNITED STATES. On Feb. 21, House of Representatives adopted H. J. Res. 46 for revision of Chinese treaties. *Cong. Rec.*, Feb. 21, 1927, p. 4347. On Feb. 25, State Department replied to H. Res. 431 to the effect that American military forces in China were there to protect American lives and interests. Text: *U. S. Daily*, March 4, 1927, p. 2.

23–26 GREAT BRITAIN—RUSSIA. Exchanged notes respecting the relations between the two governments. Texts: *G. B. Russia* no. 1 (1927), *Cmd.* 2822. *Times*, Feb. 24, and 28, 1927, pp. 13 and 11. *E. E. P. S.*, Mar. 31, 1927, p. 381.

24 GREAT BRITAIN—UNITED STATES. Notes exchanged between Great Britain and United States, and letter to Senator Borah made public, regarding sending of British cruiser to Nicaragua as a "base of refuge" for British subjects. Texts: *U. S. Daily*, Feb. 25, 1927, p. 1. *Times*, Feb. 25, 1927, p. 14.

25 CHINA. Diplomatic Body at Peking issued declaration in regard to neutrality of International Settlement at Shanghai. *Times*, Feb. 26, 1927, p. 10.

March, 1927

1 CANADA—NEWFOUNDLAND. Dispute regarding Labrador boundary in $250,000,000 law suit, decided in favor of Newfoundland, by Judicial Committee of the British Privy Council. *Times*, March 2, 1927, p. 16–17. *Contemp. R.*, April, 1927, p. 42. *R. R.*, June, 1927, p. 650.

1 CZECHOSLOVAKIA—SPAIN. Permanent commercial treaty signed July 29, 1925, ratified and made public. Text: *U. S. Daily*, March 1, 1927, p. 2. *Ga. de Madrid*, Feb. 11, 1927.

1 MEXICO—UNITED STATES. Borah-Calles letters of Jan. 22 and 24, relative to oil companies and the new petroleum law, made public. Data on oil lands. Text: *U. S. Daily*, March 1, 1927, p. 1. *N. Y. Times*, March 1, 1927, p. 3.

7–17 ITALY—RUSSIA. Exchanged notes regarding ratification of Bessarabian treaty by Italy. Text: *Nation* (N. Y.), April 27, 1927, p. 486.

7–12 LEAGUE OF NATIONS COUNCIL. Held 44th session, with German representative, Dr. Stresemann, acting as President for the first time. Reviewed progress of work of social and financial reconstruction, preparation of the Economic Conference, etc. *L. N. M. S.*, April 15, 1927, p. 56.

10 NORWAY—SWEDEN. Exchanged ratifications of arbitration convention signed Nov. 26, 1925. *C. S. Monitor*, April 4, 1927, p. 8.

12 FRANCE—UNITED STATES. Exchanged ratifications of liquor smuggling treaty signed at Washington June 30, 1924. Text: *U. S. Treaty Series*, no. 755.

14 ARMS TRAFFIC. Special Commission on the Supervision of Private Manufacture of Arms met at Geneva to consider a draft convention. *L. N. M. S.*, Apr. 15, 1927, p. 58. Text of convention: *U. S. Daily*, Mar. 4, 1927, p. 2.

15 DENMARK—GREAT BRITAIN. Exchanged ratifications of convention of June 4, 1926, renewing the arbitration convention of Oct. 25, 1905. Text: *G. B. Treaty Series*, no. 9 (1927), *Cmd.* 2835.

15 GREAT BRITAIN—ICELAND. Exchanged ratifications of convention between the United Kingdom and Iceland renewing, as far as Iceland is concerned, the Anglo-Danish arbitration convention of Oct. 25, 1905. Text: *G. B. Treaty Series*, no. 10 (1927), *Cmd.* 2836.

16 NICARAGUA—UNITED STATES. Copy of treaty proposed by President Diaz, received by State Department. *U. S. Daily*, Mar. 17, 1927, p. 2. On March 23, State Department announced that Nicaragua had purchased munitions from the U. S. War Department under contract dated Feb. 25, 1927. Announced on April 7 that Henry L. Stimson, former Secretary of War, would sail for Nicaragua on April 9 to obtain information concerning entire situation for the use of the government. *U. S. Daily*, April 8, 1927, p. 1. On May 12, advices from Col. Stimson stated that insurrection was ended and Liberals had consented to lay down arms on strength of guarantees. *U. S. Daily*, May 14, 1927, p. 1.

21–26 AMERICAN INSTITUTE OF INTERNATIONAL LAW. Met in Montevideo to discuss codification of international law and other matters. *El Dia* (Montevideo), Mar. 19–26, 1927.

21 DISARMAMENT. America's note to League of Nations opposing international supervision of armaments, delivered to League of Nations on March 10, made public. Text: *N. Y. Times*, March 22, 1927, p. 4. *Cur. Hist.*, May, 1927, *26:* 269. *U. S. Daily*, Mar. 22–23, 1927. *Press notice*, Mar. 21, 1927.

21 DISARMAMENT CONFERENCE PREPARATORY COMMISSION. (League of Nations.) Held first session at Geneva on March 21, to consider draft convention by Lord Cecil (England) and Paul Boncour (France). Closed its sessions on April 26. Next session fixed provisionally for November 1, 1927. *Times*, April 27, 29, 1927, pp. 13 and 15. *Cur. Hist.*, June, 1927, *26:* 459.

22 INTERNATIONAL LAW CODIFICATION COMMITTEE. (League of Nations.) Opened third session at Geneva on March 22 to consider replies from 26 governments on questions and reports submitted by the committee for their opinion, and the examination of a list of questions studied by subcommittees, on which opinions have not yet been requested. *L. N. M. S.*, April 15, 1927, p. 62. Closed on April 2. Summary of work: *U. S. Daily*, April 20, 1927, p. 2. *L. N. News*, May, 1927.

22 MEXICO—UNITED STATES. Smuggling treaty abrogated by United States effective March 28. *U. S. Daily*, Mar. 23, 1927, p. 1.

28 GREECE—RUMANIA. Provisional commercial agreement signed at Athens. *Commerce Reports*, May 9, 1927, p. 375.

29 FRANCE—PERU. Arrangement relative to military service, signed at Paris March 16, 1927, promulgated in France. Text: *J. O.*, April 5, 1927, p. 3794.

30 GREAT BRITAIN—MEXICO. Signed agreement to adjudicate damages due to Britons for losses in revolts. Summary of terms: *U. S. Daily*, March 31, 1927, p. 1. *N. Y. Times*, Mar. 31, 1927, p. 5. *Times*, Mar. 31, 1927, p. 13.

31 FRANCE—GERMANY. Modifications of provisional commercial and economic arrangements signed at Paris March 31, 1927. Text: *J. O.*, April 5, 1927, p. 3794.

April, 1927

5 DENMARK—GREAT BRITAIN. Exchanged ratifications of convention respecting workmen's compensation for accidents signed Nov. 18, 1925. *G. B. Treaty Series*, no. 12 (1927), *Cmd.* 2851.

5 GREAT BRITAIN—SPAIN. Signed convention revising certain provisions of the Anglo-Spanish treaty of commerce and navigation of Oct. 31, 1922. *G. B. Treaty Series*, no. 13 (1927), *Cmd.* 2855.

5 HUNGARY—ITALY. Treaty of friendship, conciliation and arbitration signed at Rome. *N. Y. Times*, April 6, 1927, p. 6. *Times*, April 6, 1927, p. 13. Text: *E. E. P. S.*, April 15, 1927, p. 438.

6 BRIAND PEACE PROPOSAL. Recommendation to American people, for a treaty renouncing war as a remedy for disputes between France and the United States, made public. Text: *N. Y. Times*, April 25, 1927, p. 22. *N. C. P. W. News B.*, May 1, 1927, p. 1.

6 PHILIPPINE ISLANDS. Plebiscite on independence rejected by President Coolidge in veto of act proposing it. Text of message: *N. Y. Times*, April 7, 1927, p. 1. *U. S. Daily*, April 8, 1927, p. 2.

7 CUBA—UNITED STATES. Abrogation by Cuba of parcel post convention, effective March 1, 1928, announced by Postmaster General. *U. S. Daily*, April 8, 1927 p. 12.

8 IRISH FREE STATE—SPAIN. Commercial *modus vivendi* of March 14, 1924, denounced by Irish Free State, to expire on Oct. 7, 1927. *Commerce Reports*, June 6, 1927, p. 626.

9 GREAT BRITAIN—GREECE. Signed agreement concerning Greek war debt to Great Britain. *Times*, April 11, 1927, p. 14. Text: *E. E. P. S.*, May 15, 1927, p. 577.

11–15 CHINESE INDEMNITY. Great Britain, United States, France, Italy and Japan made reparation demands for Nanking outrages on March 24 in identic notes to Cantonese Foreign Office on April 11. Text: *U. S. Daily*, April 12, 1927, p. 1. *Times*, April 12, 1927, p. 16. On April 15, reply of Nationalist Government refused to apologize for Nanking incident and suggested an international commission to establish the blame for attack. Text: *U. S. Daily*, April 16, 1927, p. 2.

12 FRANCE—NORWAY. Treaty on wines and liquors signed at Paris April 12, 1927, came into force, provisionally, in France. Text: *J. O.*, April 17, 1927, p. 4346.

12 PAN AMERICAN UNION. Governing Board approved report of special committee on draft convention on organization of Pan American Union. Text of statement of Governing Board: *U. S. Daily*, April 15, 1927, p. 2.

15 AUSTRIA—CZECHOSLOVAKIA. All existing tariff conventions between the two countries expired. *Commerce Reports*, April 18, 1927, p. 181.

15 RUSSIA—SWITZERLAND. Signed agreement adjusting controversy over assassination of Vaslov Vorovski, Soviet representative at Lausanne Conference in 1923. Text: *E. E. P. S.*, April 30, 1927, p. 507.

16 INTERNATIONAL COMMISSION OF JURISTS. Met in Rio de Janeiro. *Jornal do Brasil*, April 19, 1927. *C. S. Monitor*, May 14, 1927, p. 5.

18 PAN UNION CONGRESS OF SOVIETS. Met in Riga. Rykoff delivered the Soviet Government's official report on international relations, with special reference to Great Britain, China, the League of Nations, disarmament and the prospects of war. *Times*, April 19, 1927, p. 9.

21 SHANGHAI COURT. Text of provisional agreement for establishment of the Shanghai Provisional Court designed to replace the Mixed Court in the International Settlement, signed Aug. 31, 1926, made public, together with related documents and correspondence. *U. S. Daily*, April 21, 1927, p. 2. Supplement to this JOURNAL, p. 113.

23 BELGIUM—PARAGUAY. Most-favored-nation commercial treaty denounced by Paraguay on Jan. 19, 1926, extended for one year beginning Feb. 20, 1927. *Commerce Reports*, May 30, 1927, p. 563.

23 TACNA. Announced that State Department had received summary of Chilean decree nationalizing the Province of Tacna. *U. S. Daily*, April 25, 1927, p. 2.

25 FOREIGN POLICY OF THE UNITED STATES. President Coolidge addressed United Press Association in New York on American foreign policy, with special reference to Mexico, Nicaragua and China. Text: *U. S. Daily*, April 26, 1927, p. 1.

27 CZECHOSLOVAKIA—UNITED STATES. Reciprocal copyright arrangement effected by proclamation of the Presidents of each country. *Press notice*, April 30, 1927.

28 FRANCE—HUNGARY. Provisional commercial agreement arranged by exchange of notes. *J. O.*, May 24, 1927, p. 5411.

May, 1927

2–4 GREAT BRITAIN—UNITED STATES. Exchanged notes regarding statements contained in a letter dated March 15, 1927, from Andrew W. Mellon, Secretary of the Treasury of the United States, to President Hibben of Princeton University, on interallied debts. Text: *U. S. Daily*, May 5, 1927, p. 1. Text of British note: *Times*, May 5, 1927, p. 15. Mellon's statement: *Times*, May 6, 1927, p. 14. *E. E. P. S.*, May 15, 1927, p. 567.

2–5 PAN AMERICAN COMMERCIAL CONGRESS. Third conference held in Washington. *U. S. Daily*, May 3–6, 1927. *P. A. U.*, May, 1927.

4 ECONOMIC CONFERENCE. Opened at Geneva. *N. Y. Times*, May 5, 1927, p. 4. *Times*, May 5, 1927, p. 18. *Journal of the Int. Econ. Conf.*, no. 1, May 4, 1927.

10 BRITISH COLONIES. First Colonial Office Conference opened at London. *Times*, May 11, 1927, p. 14.

13 CHINA. Dr. Wu, Nanking's foreign minister, issued official statement in English appealing for negotiations on treaties. Text: *N. Y. Times*, May 14, 1927, p. 1.

15 FRANCE—SAAR BASIN. Convention concerning circulation of automobiles in France and the Sarre signed at Paris April 14, 1926, came into force. Text: *J. O.*, May 6, 1927, p. 4851.

INTERNATIONAL CONVENTIONS

AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocols of Amendments to Arts. 5, 34. London, Oct. 27, 1922.
Promulgation: France. Mar. 18, 1927. *J. O.*, March 27, 1927, pp. 3433, 3434.

ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.
Ratification: Monaco. Feb. 8, 1927. *L. N. O. J.*, March, 1927, p. 289.

ARMS TRAFFIC. CONVENTION. Geneva, June 17, 1925.
Ratification: France. *L. N. O. J.*, March, 1927, p. 288.

ARMS TRAFFIC. Declaration Regarding Ifni. Geneva, June 17, 1925.
Ratification: France. *L. N. O. J.*, March, 1927, p. 288.

ARMS TRAFFIC. Protocol of Signature. Geneva, June 17, 1925.
Ratification: France. *L. N. O. J.*, March, 1927, p. 288.

ARMS TRAFFIC. Protocol on Chemical Warfare. Geneva, June 17, 1925.
Ratification: France. *L. N. O. J.*, March, 1927, p. 288.

BESSARABIAN TREATY. Paris, Oct. 28, 1920.
Ratification: Italy. March 8, 1927. *Europe*, March 12, 1927.

CIVIL PROCEDURE. The Hague, July 17, 1905.
Adhesion:
Czechoslovakia. Oct. 20, 1926.
Finland. Nov. 26, 1926. *R. de droit int. privé*, 1927, p. 146.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.
Ratifications:
Bulgaria. Dec. 10, 1926.
Czechoslovakia. Feb. 10, 1927.
Morocco. Nov. 8, 1926.
Switzerland. Jan. 3, 1927.
Tunis. Nov. 8, 1926. *L. N. O. J.*, March, 1927, p. 289.

ELECTRIC POWER TRANSMISSION. Geneva, Dec. 9, 1923.
Adhesion: Uganda Protectorate. Jan. 12, 1927.
Ratifications: Austria. Jan. 20, 1927.
Czechoslovakia. Nov. 30, 1926. *L. N. O. J.*, March, 1927, p. 287.

EMPLOYMENT OF CHILDREN IN AGRICULTURE. Geneva, Nov. 16, 1921.
Ratification: Hungary. Feb. 2, 1927. *L. N. O. J.*, March, 1927, p. 289.

EPIZOÖTIC OFFICE. Paris, Jan. 25, 1924.
Ratification deposited: Siam. May 6, 1927. *J. O.*, May 9, 1927, p. 4955.

HYDRAULIC POWER. Geneva, Dec. 9, 1923.
Adhesion: Uganda Protectorate. Jan. 12, 1927.
Ratification: Austria. Jan. 20, 1927. *L. N. O. J.*, March, 1927, p. 287.

MARITIME PORTS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Adhesion: Austria. Jan. 20, 1927.
Ratification: Greece. Jan. 20, 1927. *L. N. O. J.*, March, 1927, p. 287.

OPIUM CONVENTION. Geneva, Feb. 19, 1925.
Adhesions:
Bolivia. Jan. 19, 1927.
Monaco. Feb. 9, 1927.
Ratification: Salvador. Dec. 2, 1927. *L. N. O. J.*, March, 1927, p. 287.

OPIUM CONVENTION. Protocol. Geneva, Feb. 19, 1925.
Adhesion: Bolivia. Jan. 19, 1927.
Ratification: Salvador. Dec. 2, 1926. *L. N. O. J.*, March, 1927, p. 287.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.
Signatures:
Austria. Jan. 12, 1927. (renewed)
Guatemala. Dec. 17, 1926.
Norway. Sept. 22, 1926. *L. N. O. J.*, March, 1927, p. 289.
Ratification:
Austria. March 13, 1927.
Finland. March 3, 1927. *L. N. M. S.*, April 15, 1927, p. 57.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of Signature. Geneva, Dec. 16, 1920.
Ratification deposited: Germany. March 11, 1927. *L. N. M. S.*, April 15, 1927, p. 57.

RAILWAYS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Ratification: Austria. Jan. 20, 1927. *L. N. O. J.*, March, 1927, p. 287.

SLAVERY CONVENTION. Geneva, Sept. 25, 1926.
Signatures:
France. Dec. 11, 1926.
Union of South Africa. Dec. 31, 1926. *L. N. O. J.*, March, 1927, p. 288.

TRAFFIC REGULATION. Paris, April 24, 1926.
Ratifications deposited:
Egypt. March 5, 1927.
Spain. March 7, 1927. *J. O.*, March 13, 1927, p. 2930.

WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875. Revision, Sèvres, Oct. 6, 1921.
Ratification deposited: Mexico. April 15, 1927. *J. O.*, April 28, 1927, p. 4602.

WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.
Promulgation: France. Feb. 20, 1927. *J. O.*, Feb. 25, 1927, p. 2373.
Ratification: Greece. Dec. 22, 1926. *L. N. O. J.*, March, 1927, p. 289.

WINE BUREAU. Paris, Nov. 29, 1924.
Ratification: France. April 15, 1927. *J. O.*, April 26, 1927, p. 4546.

WORKMEN'S COMPENSATION FOR ACCIDENTS (Equality of Treatment). Geneva, June 5, 1925.
Ratification: Czechoslovakia. Feb. 8, 1927. *L. N. O. J.*, March, 1927, p. 289.

WORLD COURT RESERVATIONS CONFERENCE. Final Act. Geneva, Sept. 23, 1926.
Signature: Union of South Africa. Dec. 31, 1926. *L. N. O. J.*, March, 1927, p. 289.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

GENERAL CLAIMS COMMISSION—UNITED STATES AND MEXICO

L. F. H. NEER AND PAULINE E. NEER *v.* MEXICO (Docket No. 136)

Opinion rendered October 15, 1926

In deciding claims predicated on a denial of justice, the propriety of governmental acts should be put to the test of international standards. The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law, or from the fact that the laws of the country do not empower the authorities to measure up to international standards, is immaterial.

Separate concurring opinion by NIELSEN, Commissioner.

1. This claim is presented by the United States against the United Mexican States in behalf of L. Fay H. Neer, widow, and Pauline E. Neer, daughter, of Paul Neer, who, at the time of his death, was employed as superintendent of a mine in the vicinity of Guanaceví, State of Durango, Mexico. On November 16, 1924, about eight o'clock in the evening, when he and his wife were proceeding on horseback from the village of Guanaceví to their home in the neighborhood, they were stopped by a number of armed men who engaged Neer in a conversation, which Mrs. Neer did not understand, in the midst of which bullets seem to have been exchanged and Neer was killed. It is alleged that, on account of this killing, his wife and daughter, American citizens, sustained damages in the sum of $100,000.00; that the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits; and that therefore the Mexican Government ought to pay to the claimants the said amount.

2. As to the nationality of the claim, which is challenged, the Commission refers to the principles expounded in paragraph 3 of its opinion and decision rendered in the case of William A. Parker on March 31, 1926.[1] On the record as presented, the Commission decides that the claimants were by birth, and have since remained, American nationals.

3. As to lack of diligence, or lack of intelligent investigation, on the part of the Mexican authorities, after the killing of Paul Neer had been brought to their notice, it would seem that in the early morning after the tragedy these authorities might have acted in a more vigorous and effective way than they did, and moreover, that both the special agent of the Attorney General of Durango (in his letter of November 24, 1924), and the Governor of that State, who proposed the removal of the judge of Guanaceví, have shared

[1] Printed in the JOURNAL, Jan., 1927, p. 174.

this opinion. The Commission is mindful that the task of the local Mexican authorities was hampered by the fact that the only eye-witness of the murder was unable to furnish them any helpful information. There might have been reason for the higher authorities of the State to intervene in the matter, as they apparently did. But in the view of the Commission there is a long way between holding that a more active and more efficient course of procedure might have been pursued, on the one hand, and holding that this record presents such lack of diligence and of intelligent investigation as constitutes an international delinquency, on the other hand.

4. The Commission recognizes the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty. In 1910, John Bassett Moore observed that he did "not consider it to be practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined" (American Journal of International Law, 1910, p. 787), and in 1923 De Lapradelle and Politis stated that the evasive and complex character (*le caractére fuyant et complexe*) of a denial of justice seems to defy any definition (*Recueil des Arbitrages Internationaux*, II, 1923, p. 280). It is immaterial whether the expression "denial of justice" be taken in that broad sense in which it applies to acts of executive and legislative authorities as well as to acts of the courts, or whether it be used in a narrow sense which confines it to acts of judicial authorities only; for in the latter case a reasoning, identical to that which—under the name of "denial of justice"—applies to acts of the judiciary, will apply—be it under a different name—to unwarranted acts of executive and legislative authorities. Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold, (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law, or from the fact that the laws of the country do not empower the authorities to measure up to international standards, is immaterial.

5. It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities at Guanaceví might have been more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree to improper action, or (2) that Mexican law rendered it impossible

for them properly to fulfil their task. No attempt is made to establish the second point. The first point is negatived by the full record of police and judicial authorities produced by the Mexican Agent, though the Commission feels bound to state once more that in its opinion better methods might have been used. From this record it appears that the local authorities, on the very night of the tragedy, November 16, went to the spot where the killing took place and examined the corpse; that on November 17, the judge proceeded to the examination of some witnesses, among them Mrs. Neer; that investigations were continued for several days; that arrests were made of persons suspected; and that they were subsequently released for want of evidence. The American Agency in rebuttal offers nothing but affidavits stating individual impressions or suppositions. In the light of the entire record in this case the Commission is not prepared to hold that the Mexican authorities have shown such lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as would render Mexico liable before this Commission.

Decision

6. The Commission accordingly decides that the claim of the United States is disallowed.

Done at Washington, D. C., this 15th day of October, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

SEPARATE OPINION

While concurring in the decision disallowing this claim, I find myself unable to concur fully in the statement of reasons upon which the other two members of the Commission think the award should be grounded. Because of that fact I deem it to be advisable, having in mind particularly the importance of the rules and principles of law involved in the case, to state my own views somewhat in detail.

This claim is presented by the United States against the United Mexican States in behalf of L. Fay H. Neer, widow, and Pauline E. Neer, daughter, of Paul Neer, a native American citizen, who was killed in the vicinity of the village of Guanaceví, State of Durango, Mexico, on November 16, 1924. The claim is grounded on an assertion of a denial of justice growing out of the failure of Mexican authorities to take adequate measures to apprehend and punish the persons who killed Neer. An indemnity in the sum of $100,000.00 is asked in behalf of the claimants as heirs of the deceased.

There is no dispute regarding the material facts in relation to the killing of Neer in so far as they are disclosed by evidence. Neer, at the time of his death, was employed as superintendent of a mine at Guanaceví. At about

eight o'clock in the evening of the day on which he was killed, he and his wife were proceeding on horseback from Guanaceví to their home about three miles distant from the village. When they had gone approximately a third of the distance they were stopped by a number of men who engaged Neer in conversation, which Mrs. Neer did not understand. In the midst of this conversation Neer was shot and killed. An examination of the corpse revealed that three bullets had penetrated his body. Mrs. Neer was able to furnish but very little information of value in identifying the men by whom her husband was accosted.

Some question is raised in the answer of the United Mexican States with respect to the right of the United States to maintain the claim in behalf of the claimants. However, it is merely stated in the answer that "the American nationality of the claimants and of the deceased Paul Neer is not duly proved in the memorial," and in the light of what I consider to be entirely convincing evidence produced on this point I have no doubt as to the right of the United States to prefer this claim in behalf of the claimants as American heirs of a deceased American citizen.

Among the annexes accompanying the memorial of the United States are certain affidavits. Mrs. Neer, in an affidavit made by her, states that "the Mexican Government did not make an adequate or thorough investigation of the facts connected with the murder of said Paul Neer and failed and neglected to take any adequate measures to apprehend and punish the murderers of said Paul Neer" (pp. 23–24). Herman Dauth, a resident of Guanaceví at the time of Neer's death, states in an affidavit that "to his personal knowledge no effort was made by the local authorities to apprehend the murderers and assailants, either the day following the murder or the day thereafter, but that on the third day Indian trailers were sent to the scene of the murder and discovered the exploded shells behind the stone walls." The affiant further expresses the belief that had prompt and proper methods been employed by the local authorities, the identity of the murderers of the said Paul Neer could have been ascertained (p. 27). Another affiant, John N. Brooks, Jr., an employee in general charge of the Guanaceví Unit of the *Cia. Minera de Penoles, S. A.*, situated near Guanaceví, swears that "some inquiry and search was made by the authorities of the State of Durango to ascertain who were the murderers of said Paul Neer, but to his knowledge no reward was ever offered for their apprehension and no special pains or care were taken by the authorities to apprehend and punish the murderers" (p. 29).

To refute the charge that Mexican authorities failed to take proper measures to apprehend and bring to justice the persons who killed Neer, the Mexican Government filed with its answer a record of proceedings instituted and carried on before the Judge of First Instance of the Judicial District of Guanaceví. From this record it appears that the judge, on November 17, the day following the killing of Neer, ordered an investigation;

that on the same day members of the court went to the place where the killing took place; that they examined the corpse which had been removed to a near-by residence, and that they then proceeded to the examination of witnesses, including Mrs. Neer. It further appears that the examination of witnesses was continued for several days; that arrests were made of certain persons suspected of the killing of Neer; and that they were subsequently released for want of evidence implicating them in the deed.

The Agent of Mexico, in his argument before the Commission, emphasized that the Mexican authorities had complied with the forms of Mexican law in the investigation of the killing of Neer, and he asserted that the efficacy of the law had been proved in the light of experience.

The sovereign rights of a nation with regard to the enactment and execution of laws of this character within its jurisdiction is of course well understood. Vattel, in asserting a general principle in relation to these rights, adds some observations as to the respect that should be accorded to the measures employed by nations in the exercise of such rights. He says:

> The sovereignty united to the domain establishes the jurisdiction of the nation in her territories, or the country that belongs to her. It is her province, or that of her sovereign, to exercise justice in all the places under her jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country.
>
> Other nations ought to respect this right. And, as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just, and executed as such,—when once a cause in which foreigners are interested has been decided in form, the sovereign of the defendants cannot hear their complaints. To undertake to examine the justice of a definitive sentence is an attack on the jurisdiction of him who has passed it. The prince, therefore, ought not to interfere in the causes of his subjects in foreign countries, and grant them his protection, excepting in cases where justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or, finally, an odious distinction made, to the prejudice of his subjects, or of foreigners in general.—Law of Nations. (Chitty's edit. 1869, Book II, pp. 165–166.)

Although there is this clear recognition in international law of the scope of sovereign rights relating to matters that are subject of domestic regulation, it is also clear that the domestic law and the measures employed to execute it must conform to the requirements of the supreme law of members of the family of nations which is international law, and that any failure to meet those requirements is a failure to perform a legal duty, and as such, an international delinquency. Hence a strict conformity by authorities of a government with its domestic law is not necessarily conclusive evidence of the observance of legal duties imposed by international law, although it may be important evidence on that point.

The functions exercised by the judge at Guanaceví in investigating the death of the American citizen, Neer, and in taking steps to apprehend the

persons who shot him were evidently not judicial acts in the sense in which the term judicial is generally used. The duties the judge discharged may be said to be in a measure those of a police magistrate. However, the precise character of acts of the judge is not a material point. The claim preferred by the United States is predicated on a denial of justice. I think it is useful and proper to apply the term denial of justice in a broader sense than that of a designation solely of a wrongful act on the part of the judicial branch of the government. I consider that a denial of justice may, broadly speaking, be properly regarded as the general ground of diplomatic intervention. This view, which has often been expressed, was well stated in the opinion rendered by Sir Henry Strong and Mr. Don M. Dickinson in the so-called "El Triunfo" case in which it was said:

> It is not the denial of justice by the courts alone which may form the basis for reclamation against a nation, according to the rules of international law.
>
> "There can be no doubt"—says Halleck—"that a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the government, so far as the acts are done in their official capacity." Ralston, International Arbitral Law and Procedure, p. 51; Foreign Relations of the United States, 1902, p. 870.

The controversial questions that arise between nations from time to time with respect to complaints of denial of justice are numerous and varied. But it is probably not so very difficult to formulate a practicable and sound standard by which to test the propriety of intervention or the right of a nation to claim pecuniary reparation in any given case.

It may perhaps be said with a reasonable degree of precision that the propriety of governmental acts should be determined according to ordinary standards of civilization, even though standards differ considerably among members of the family of nations, equal under the law. And it seems to be possible to indicate with still further precision the broad, general ground upon which a demand for redress based on a denial of justice may be made by one nation upon another. It has been said that such a demand is justified when the treatment of an alien reveals an obvious error in the administration of justice, or fraud, or a clear outrage. The thought is expressed to some extent in an opinion given by Commissioner Bertinatti in the Medina case under the convention of July 2, 1860, between Costa Rica and the United States in which it was said:

> It being against the independence as well as the dignity of a nation that a foreign government may interfere either with its legislation or the appointment of magistrates for the administration of justice, the consequence is that in the protection of its subjects residing abroad a government, *in all matters depending upon the judiciary power*, must confine itself to secure for them free access to the local tribunals, besides an *equality of treatment with the natives* according to the conventional law established by treaties.

> Only a formal denial of justice, the dishonesty or *prevaricatio* of a judge legally proved, "the case of torture, the denial of the means of defense at the trial, or gross injustice, *in re minime dubia*," (see opinion of Phillimore in the controversy between the governments of Great Britain and Paraguay) may justify a government in extending further its protection. Moore, International Arbitrations, Vol. 3, p. 2317.

There may of course be honest differences of opinion with respect to the character of governmental acts, but it seems to be clear that an international tribunal is guided by a reasonably certain and useful standard if it adheres to the position that in any given case involving an allegation of a denial of justice it can award damages only on the basis of convincing evidence of a pronounced degree of improper governmental administration.

In the case before the Commission no charge is made of a failure of any duty by Mexican authorities to prevent the commission of an offense. Indemnity is claimed because of the alleged neglect of the authorities to take proper measures to apprehend and punish the persons who killed Neer. It has been repeatedly asserted by international tribunals that a failure of authorities to take adequate measures of this kind renders a nation liable to respond in damages. Thus, Mr. Findlay, in the opinion written by him in the case of Amelia de Brissot, under the convention of December 5, 1885, between the United States and Venezuela, said:

> It would be wholly unwarranted, therefore, to hold Venezuela responsible for not anticipating and preventing an outbreak, of which the persons most interested in knowing and the very actors on the spot had no knowledge. A state, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offense, or some honest endeavor made for his arrest and punishment.—Moore, International Arbitrations, Vol. 3, p. 2969.

To the same effect Commissioner Little in the opinion written by him in that case said:

> Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not. Without entering upon a discussion of the investigation instituted and conducted by her, it seems there was fault in not causing the leaders, at least, of this lawless band to be arrested. It was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice. Had there been a well-directed effort of that kind, or had the government's investigation disclosed their innocence, and failed to discover those actually guilty, its responsibility would perhaps have ended, assuming the investigation, as I do, was a fair and just one. *Op. cit.*, p. 2968.

See also the Poggioli Case before the Italian-Venezuelan Commission of 1903, Ralston, Report, p. 847, 869; Bovallins and Hedlund Cases, *ibid.*, p.

952; case of Ruden & Company under the Convention of July 12, 1863, between the United States and Peru, Moore, International Arbitrations, Vol. 2, p. 1653.

It was argued in behalf of the United States that there was an unwarranted delay in steps taken to apprehend the persons who killed Neer; that the proceedings of investigation were of such a public character as to put persons implicated in the crime on guard and to enable them to escape; that detectives might have been employed to apprehend the offenders. I am of the opinion that better methods might have been used by the Mexican authorities, and that the action taken by them may well be adversely criticized.

But in the light of the entire record in the case before us I am not prepared to decide that a charge of a denial of justice can be maintained against the Government of Mexico conformably to the principles which according to my views as above expressed should govern the action of the Commission.

I accordingly concur in the decision that the claim of the United States is disallowed.

FRED K. NIELSEN,
Commissioner.

J. W. AND N. L. SWINNEY *v.* MEXICO (Docket No. 130)

Opinion rendered November 16, 1926

Denial of justice—Laches by judicial authorities.
Damages awarded for the unlawful killing of an American citizen by Mexican rural officers and the failure of the Mexican authorities to bring them to trial.

Counsel: United States, Stanley H. Udy; Mexico, Oscar Rabasa.

1. This claim is presented by the United States against the United Mexican States in behalf of J. W. Swinney and N. L. Swinney, parents of Walter G. Swinney, a young American citizen, who in the afternoon of Sunday, February 5, 1922, while engaged in a trapping expedition on the Río Bravo or Río Grande del Norte, at a point not remote from Nuevo Laredo, Tamaulipas, Mexico, was shot from the Mexican bank by two armed Mexicans and who died the next morning in the hospital at Laredo, Texas, U. S. A. One of these two Mexicans, Urbano Solís, a rural judge in the service of the municipality of Nuevo Laredo, was arrested on or about February 5, 1922; the other one, José Maria Cruz, a rural police of the same municipality, was arrested on or about February 7, 1922, released before the end of February, but re-arrested on March 8, 1922, at the instance of the American consul; both of them were finally discharged and released on November 15, 1922, without any trial being held. It is alleged that the death of said Walter Swinney caused to his parents (the claimants), American nationals, damages in the sum of $25,000; that the Mexican authorities showed an unwarrantable neglect and indifference in investigating the case and prosecuting the culprits; and that on account of this

unlawful killing and denial of justice Mexico ought to pay to the claimants the said amount with interest thereon.

2. A challenge of the nationality of the claim has been withdrawn during the oral hearing of the case.

3. The occurrence was as follows: Solís had supervision over the river in regard to smuggling endeavors, and on the very day of the occurrence the attention of him and his colleagues had by their superiors been drawn to the fact that rumors were being heard about probable attempts of revolutionaries to cross near the places under Solís' supervision. His part of the river was one of those where crossing the river with goods and using either the Mexican or the American bank as an entry port was forbidden. In the afternoon of that Sunday Solís accidentally saw the boats of Swinney and his older companion McCampbell on the river, and wondering whether their business was lawful, went to take his helper Cruz from his house and go to the spot. When about 4 p. m. they discovered Swinney peaceably floating down the river, in a boat which in reality contained nothing besides himself and his firearms, they contend that they took him for a man who was there in contravention of the laws which it was especially their duty to enforce; their suspicion was strengthened by the fact that Solís, on his previous accidental discovery of the two boats, had thought the other boat loaded. This first contention is not disproven by the evidence; neither is the contention that Swinney refused to obey Solís' summons to come nearer in order to give the necessary explanations, and instead of doing so rowed to the opposite bank. Theoretically it might be doubted whether Swinney recognized the two Mexicans as river guards (custom guards) or similar officials; but anyone in these parts may be supposed to know that the river is being carefully watched by armed officials and that the presence on the river bank of officials seeking information of occurrences on and near the river is on both sides extremely likely. The second allegation of the two officials, however, is that, after Swinney disobeyed the summons, Solís shot in the water to frighten him, whereupon Swinney shot at them three times and a second shooting on their part followed which was in self-defense and mortally wounded him. By that time Swinney was near the American bank and was taken out of the water by his companion; the rural judge Solís went at once to the competent authority at Nuevo Laredo, to give a full account of what had happened and place himself at the hands of justice.

4. The Commission, though mindful of the special task of Solís and of the special instructions given him quite recently, is far from satisfied that the shooting which ended in this tragedy was not reckless. There is every reason to doubt whether Swinney in his boat shot at the Mexican officials. The record mentions the inspection of Swinney's pistol, first by the witness Rodríguez and afterwards by the American consul, vice-consul and undertaker, disclosing that it could not have been used. A statement purporting to have been made by McCampbell to the effect that Swinney fired from the

American bank, after he had been wounded but not before that time, occurs in the consul's report of February 9, 1922, but does not appear in McCampbell's own affidavit of September 28, 1923. It is not clear from the record why Swinney looked like a smuggler or a revolutionary at that time and place, and how the Mexican officials could explain and account for their act of shooting under these circumstances, even when they considered him committing an unlawful act in crossing from one bank to another (a fact they did not see). Human life in these parts, on both sides, seems not to be appraised so highly as international standards prescribe. In the light (among other things) of the correspondence between the Governments of Great Britain and the United States relative to the reckless killing in 1914 on the Canadian border of the United States of one Walter Smith, who, while engaged in unlawfully shooting ducks, did not obey a summons of soldiers of the Canadian militia but rowed away (Foreign Relations, 1915, pp. 414–423), the Commission holds that this killing of Swinney has been an unlawful act of Mexican officials.

5. As to investigation of the case reported to them by Solís himself, there is from the record no reasonable doubt that the Mexican judicial authorities acted with a laches which must strike painfully not only those interested in the deceased men, but any one who learns what happened. If the American consul had not been active for several months and if, as a consequence thereof, the Mexican authorities had not at last gathered some evidence on both sides, it is difficult to see how they would have obtained other information than the statements made by their own men. It is alleged and not negatived, that the Mexican authorities during the first weeks only heard the two Mexican officials involved in the tragedy, Solís and Cruz; that they made no endeavor to hear the two American eye-witnesses—Swinney's companion Philip McCampbell, who had been present at the event, and one Ignacio Rodríguez, who had seen the dying man (whom he did not know before), had talked with him and had helped to have him taken to the hospital; that these authorities only examined the eye-witnesses on the strong and repeated insistence both of the American consul at Nuevo Laredo and the American embassy at Mexico City, and only as late as March 17, 1922 (McCampbell), and May 15, 1922 (Rodriguez); that they re-arrested Cruz on the same insistence; that the public prosecutor at Nuevo Laredo did not act (and then negatively) until July 5, 1922, nor the Attorney General at Ciudad Victoria, Tamaulipas, until November 14, 1922. A request from the American embassy to the Mexican Government to have the case brought to trial (May 16, 1923) had no effect. In a case so tragic as the killing of an innocent young foreigner, granted even that the officials who killed him may have considered their act justified, these facts should have been either negatived or explained.

6. As to the discharge and release of the guilty parties, distinction ought to be made between the action taken by the public prosecutor at Nuevo

Laredo and that of the Attorney General of the State. Once evidence gathered on the indefatigable insistence of the American consul, the prosecutor at Nuevo Laredo stated that there was reason to assume that the officials acted in what they believed to be the discharge of their official duty, whereas with respect to their claim of self-defense no positive conclusion could be reached. Instead of leaving the difficult decision on these points to an impartial tribunal, the prosecutor at least did not use the unproven self-defense as an argument, but based his decree of discharge and release exclusively on Article 34, clauses XIV and XV, of the Penal Code (relating to acts of officials in the exercise of their official capacity), thereby showing that he did not feel sufficiently convinced of their having acted in self-defense. The Attorney General, on the contrary, in confirming the first decree, discharged Solis on account of clause VIII of said article, which exclusively relates to self-defense. If the Mexicans in mortally wounding Swinney acted in self-defense, the case would have been different from their shooting a man who only did not approach, but rowed away; in his decision the Attorney General merely discarded the statements opposing those of his national officials, who at the same time were the accused. The Commission has great difficulty to understand why the royal road of an open trial has been avoided.

7. The respondent government has not denied that, under the convention of September 8, 1923, acts of authorities of Tamaulipas may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicated on such acts.

8. The Commission considering among other things the financial support the deceased man gave the claimants, their prospects of life and the character of the delinquency involved holds that the claimants have suffered damages to the extent of $7,000 because of the killing of their son by Mexican authorities. For allowing interest on this amount the Commission finds no ground.

Decision

9. The Commission accordingly decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America $7,000 (seven thousand dollars), without interest, in behalf of Jesse Walter Swinney and Nancy Louisa Swinney.

Done at Washington, D. C., this 16th day of November, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

SEPARATE OPINION

I concur in the award of $7,000.00 without concurring entirely in the

grounds for the award stated in the opinion signed by the other two Commissioners.

FRED K. NIELSEN,
Commissioner.

D. GUERRERO VDA DE FALCÓN *v.* UNITED STATES (Docket No. 278)

Opinion rendered November 16, 1926

Damages awarded for death by wrongful act.

Although the American soldiers may have believed themselves justified in using firearms to prevent smuggling or in returning fire from the Mexican side, their action in directing fire against naked and defenseless Mexicans in the river was in disregard of American military regulations which forebade the firing on unarmed persons suspected of smuggling or crossing the river in places where passage was not authorized. Award apart from the failure of the American authorities to bring the soldiers to trial.

Counsel: United States, Charles Kerr; Mexico, Eduardo Suarez.

1. This claim was filed by the United Mexican States against the United States of America in behalf of Dolores Guerrero, widow of Gregorio Falcón, and of Bartolo, Apolonio, Domingo, and Mónica Falcón, children of the deceased Falcón, a Mexican citizen, who, on May 5, 1919, at about 10.30 a. m., was wounded by bullets fired by two American soldiers from the American side of the Rio Grande at a point near the ranch called Las Barreras, while he was, it is alleged in the memorial, bathing together with another Mexican named Félix Villarreal. Falcón died in the afternoon of the same day. American military and civil authorities made an investigation of the occurrences connected with the killing of Falcón. The soldiers were not brought to trial, but they were admonished for having fired on unarmed persons, although it was believed that they did so without intention to hit. It is alleged that the death of Gregorio Falcón caused his widow and his children, Mexican citizens, damages in the amount of 18,518.40 pesos, Mexican currency; that the American authorities improperly failed to bring the guilty persons to trial, and that on account of this wrongful death and a denial of justice, the United States should pay an indemnity in the aforementioned sum together with interest from May 5, 1919, to the time of payment. The record discloses the following facts: Sergeants John Smith and John Floyd of the Fourth Cavalry of the United States Army had been directed, on May 5, 1919, to patrol the river in the locality where the shooting occurred with the object of preventing smuggling and other transgressions of the law. Sergeant Smith, during the course of the investigation conducted by the military authorities, testified that while the two soldiers were making an inspection on the banks of the river they saw through long distance field glasses a naked man who was swimming towards the Mexican side and also several mounted men on the Mexican shore. Evidence on this point is not entirely clear, Sergeant Floyd stated that, "About a half mile this side of that place (Barreras) we noticed a bunch of men trying to cross the river." Both soldiers also mentioned three men who were in the river naked, while evi-

dence produced by the Mexican Government refers to but two men. It appears that the soldiers, believing that the men in the river were engaged in smuggling, approached them and directed them to halt. Falcón and Villarreal did not obey the order whereupon Sergeant Smith fired a shot in the air to cause them to stop. The soldiers testify that they were thereupon immediately fired on from the Mexican side by mounted men; that they (the soldiers) retreated, dismounted and returned to answer the fire in self-defense, and also directed some shots at the men who were in the water. It further appears that about fifty shots were exchanged in this manner while Falcón and Villarreal were approaching the Mexican shore, and that Falcón had to be assisted out of the water by Villarreal, he having been wounded by one of the bullets fired from the American side. While the two soldiers asserted that the men in the river were towing some floating cases, Falcón and Villarreal deny this and there is no other evidence bearing on the point. It also appears uncertain whether the two Mexicans had been in the American side of the river. The only evidence upon this point is the statement of Juan Muñíz a man who was on the American side at the time the occurrences in question took place, and who stated that "he had heard that two men had passed his ranch, coming from the vicinity of Mission, and that they had crossed the river." This same Muñíz, testified that he had heard shots, "but that he did not know who shot first," a statement which might be interpreted in the sense that there were shots fired from both sides of the river, or that there were shots only from the American side and that Muñíz did not notice which of the two American soldiers had fired first.

2. Mexican authorities also investigated the occurrences in question and brought the results of their investigation to the notice of the Mexican Consul at Rio Grande, who, on May 12, 1919, communicated them to the Ambassador of Mexico in the United States, who brought them to the notice of the Department of State. The American military authorities, without bringing Smith and Floyd to trial, declared them innocent of crime on the ground that they had acted in the discharge of their duty in attempting to prevent smuggling, and that even if they had made an error in firing the first shot in the air, it was natural that they should return the fire of the Mexicans in order to protect themselves from shots being fired from the Mexican side.

3. Even though it be assumed that Falcón and Villarreal were engaged in smuggling, and that American soldiers were fired upon from the Mexican side, the Commission must consider the death of Falcón to be wrongful. It appears from the record that American military regulations forbade the firing on unarmed persons suspected of smuggling or crossing the river in places where passage was not authorized. (Bulletin #4 of February 11, 1919.) The soldiers may have believed themselves justified in using firearms to prevent smuggling or in returning a fire from the Mexican side. However, it appears they disregarded American military regulations which

were evidently intended to prevent such unhappy occurrences as those underlying this claim. And according to the testimony of Sergeant Smith, they directed fire against naked and defenseless Mexicans who were in the river thereby causing the death of Falcón.

4. In view of the results of the investigation made by American civilian authorities it seems to the Commission to be somewhat odd that the soldiers should not have been brought to trial. Apart from this point, however, the Commission is of the opinion that the killing of Falcón was a wrongful act for which damages may be assessed in the amount of $7,000.00 without interest.

Decision

5. The Commission therefore decides that the Government of the United States of America must pay to the Government of the United Mexican States the sum of $7,000.00 (seven thousand dollars) without interest, on behalf of Dolores Guerrero, widow of Gregorio Falcón and Bartolo, Apolonio, Domingo and Mónica Falcón, children of the deceased Falcón.

Done at Washington, D. C., this 16th day of November, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

FRANCISCO QUINTANILLA *et al. v.* UNITED STATES (Docket No. 532)

Opinion rendered November 16, 1926

In international law a government is obligated to account for a foreigner who is taken into custody by a state official. It can not escape liability for his unlawful treatment by ignoring what happens to him. This duty to account for a man in governmental custody is not modified by the fact that the custodian himself is accused of having killed his prisoner and as an accused can not be made to testify against himself.

Counsel: United States, C. L. Bouvé, Agent; Mexico, Eduardo Suárez.

1. This claim is presented by the United Mexican States against the United States in behalf of F. Quintanilla and M. I. Perez de Quintanilla, Mexican nationals, father and mother of Alejo Quintanilla, a young man, who was killed on or about July 16, 1922, not far from Edinburg, Hidalgo County, Texas, U. S. A. On July 15, 1922, about 5 p. m. said Alejo Quintanilla in a lonely spot had lassoed a girl of fourteen years, Agnes Casey, who was on horseback, and thrown her from the horse; she screamed, and the young Mexican fled. She told the occurrence to her father, Tom Casey, with whom Quintanilla had been employed some time before; the father the next morning went to lodge his complaint with the authorities, first to Edinburg (the county seat) where he did not find the sheriff, and then to Donna where

he found the deputy sheriff, one Sam A. Bernard. According to the record, this deputy sheriff with three other men, whose names are not mentioned, went to Quintanilla's house, took him from it, and the deputy sheriff with one Walter Weaver placed him in a motor car and drove with him, first to Casey's house, where they put on a new tire, and then in the direction of Edinburg to take him to the county jail. On July 18, 1922, about noon, Quintanilla's corpse was found near the side of this road, some three miles from Edinburg, traces showing that he had been taken there in a motor car. Bernard and Weaver were accused by the Mexican Consul at Hidalgo, Texas, and were accordingly arrested, but released on bail; Bernard's appointment as a deputy sheriff was cancelled by his sheriff on July 22, 1922. The public prosecutor made investigations and submitted the case to the grand jury, but the grand jury deferred it from 1922 to 1923, from 1923 to 1924, and never took action upon it. The memorial alleges that the killing has caused to Quintanilla's parents losses and damages to the amount of 49,932.00 Mexican gold pesos, and that as these damages originated in acts of an official of the State of Texas, combined with a denial of justice, the United States is liable for them.

2. It appears from the record that Quintanilla was taken into custody on July 16, 1922, by a deputy sheriff of the State of Texas, to put him at the disposal of the judicial officers; it is left uncertain whether this official was provided with any authorization to take Quintanilla from his house and arrest him. The United States Government never reported what this deputy sheriff did with Quintanilla after he had taken him under custody. The young man apparently never reached the county jail. The deputy sheriff may have changed his mind and set him at liberty, and after that Quintanilla may have been murdered by an unknown person. An enemy of Quintanilla may have come up and taken him from the car. The companion of the deputy sheriff who was not an official may have killed Quintanilla; or the two custodians may have acted in self-defense. The United States Government has been silent on all of this. The only thing the record clearly shows is that Quintanilla was taken into custody by a State official, and that he never was delivered to any jail. The first question before this Commission, therefore, is whether under international law these circumstances present a case for which a government must be held liable.

3. The Commission does not hesitate to answer in the affirmative. The most notable parallel in international law relates to war prisoners, hostages, and interned members of a belligerent army and navy. It would be going too far to pretend that a government taking into its custody either war prisoners or hostages or interned soldiers is responsible for everything which may happen to them; but there can be no reasonable doubt that it may be called to account for them, that it is obligated to account for them, and that under international law it can not exculpate itself by merely stating that it took these men into custody and that thereafter they have disappeared

without leaving any trace. The Hague Conventions of 1907 are silent as to hostages; but as to war prisoners and persons assimilated to them (detained newspaper correspondents, etc.), they contain explicit provisions for the application of this principle (Articles 13, 14, and 16 of the fourth Hague convention of 1907); and the provisions of the fifth and thirteenth conventions of 1907 concerning the treatment of interned army and navy men would be meaningless if the respective governments were not obligated to account for the men they took into their custody. The case before this Commission is analogous. A foreigner is taken into custody by a State official. It would go too far to hold that the government is liable for everything which may befall him. But it has to account for him. The government can be held liable if it is proven that it has treated him cruelly, harshly, unlawfully; so much the more it is liable if it can say only that it took him into custody—either in jail, or in some other place and form—and that it ignores what happened to him.

4. The question then arises whether this duty to account for a man in governmental custody is modified by the fact that the custodian himself is accused of having killed his prisoner and, as an accused, can not be made to testify against himself. The two things clearly are separate. If the government is obligated to state what happened to the man in its custody, its officials are bound to inform their government. It might be that the custodians themselves perish in a calamity together with the men in their custody, and therefore can not furnish any information. But if they are alive, and are silent, the government has to bear the consequences. The Commission holds, therefore, that under international law and under Article I of the Convention of September 8, 1923, the respondent government is liable for the damages originating in this act of a State official and resulting in injustice.

5. It is useless to inquire whether, apart from this liability, the United States might have been held responsible for a denial of justice in this case. The Commission confines itself to stating that nothing in the record shows that the prosecuting officer has ascertained who were the four men that took Quintanilla from his house, what were their motives for so doing, and what was to be learned from an inspection of the car in which Quintanilla was transported. If the prosecuting officer had information as to these points, the secrecy of the investigations before the grand jury can not explain the silence of the American Agency on all of these points.

6. The respondent government has not denied that, under the convention of September 8, 1923, acts of authorities of Texas may give rise to claims against the Government of the United States. The Commission is of the opinion that claims can be predicated on such acts.

7. Considering that satisfaction is due to the parents of Quintanilla for the loss suffered by the international delinquency committed, and taking into account that the record does not show how much of his earnings went to his

parents, the Commission, on the data presented in the memorial, considers these damages not to exceed an amount of $2,000, without interest.

Decision

8. The Commission accordingly decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States $2,000 (two thousand dollars) in behalf of Francisco Quintanilla and Maria Ines Perez de Quintanilla, without interest.

Done at Washington, D. C., this 16th day of November, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

SEPARATE OPINION

I concur in the award of $2,000.00 without concurring in the grounds for the award stated in the opinion signed by the other two Commissioners.

FRED K. NIELSEN,
Commissioner.

THOMAS H. YOUMANS *v.* MEXICO (Docket No. 271)

Opinion rendered November 23, 1926

Protection of foreigners from mob violence—Responsibility for the acts of soldiers.

The action of troops in participating in the murder of foreigners imposes a direct responsibility on the government for lack of diligence in the punishment of the persons implicated in the crime.

The well-recognized rule of international law that a government is not responsible for malicious acts of soldiers committed in their private capacity does not apply when it is clear that at the time of the commission of those acts the men were on duty and under the immediate supervision and in the presence of a commanding superior. Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.

Counsel: United States, C. L. Bouvé, Agent; Mexico, Oscar Rabasa.

1. Claim for damages in the amount of $50,000.00 is made in this case by the United States of America against the United Mexican States in behalf of Thomas H. Youmans, the son of Henry Youmans, an American citizen, who, together with two other Americans, John A. Connelly and George Arnold, was killed at the hands of a mob on March 14, 1880, at Angangueo, State of Michoacán, Mexico. The occurrences giving rise to the claim as stated in the memorial are substantially as follows:

2. At the time when the killing took place, Connelly and Youmans were employed by Justin Arnold and Clinton Stephens, American citizens, who were engaged under a contract with a British corporation in driving a tunnel known as the San Hilario Tunnel, in the town of Angangueo, a place having a population of approximately 7,000 people. The work was being

done by Mexican laborers resident in the town under the supervision of the Americans. On the day when these men were killed, Connelly, who was Managing Engineer in the construction of the tunnel at Angangueo, had a controversy with a laborer, Cayetano Medina by name, over a trifling sum of about twelve cents which the laborer insisted was due to him as wages. Connelly, considering the conduct of the laborer to be offensive, ejected the latter from the house in which Connelly lived and to which Medina had come to discuss the matter. Subsequently Medina, who was joined by several companions, began to throw stones at Connelly while the latter was sitting in front of his house and approached the American with a drawn machete. Connelly, with a view to frightening his assailant, fired shots into the air from a revolver. The American having withdrawn into the house, Medina attempted to enter, and his companions followed. Connelly thereupon fired at Medina with a shot-gun and wounded him in the legs. Soon the house was surrounded by a threatening mob which increased until it numbered about a thousand people. Connelly, Youmans and Arnold, realizing the seriousness of their situation, prepared to defend themselves against the mob. Connelly's employer, Clinton Stephens, on hearing shots went to the house and learned from Connelly what had happened. Upon Stephens' advice, Connelly undertook to surrender himself to the local authorities, but was driven back into the house by the mob. The attack against Connelly when he endeavored to surrender to police authorities was led by Pedro Mondragón, a person styled the "Jefe de Manzana," with whom Connelly had been on friendly terms. Stephens, followed by a part of the mob, proceeded to the *Casa Municipal* and requested the mayor, Don Justo Lopez to endeavor to protect the Americans in the house. The mayor promptly went to the house but was unable to quiet the mob. He then returned to his office and ordered José Maria Mora, *Jefe de la Tropa de la Seguridad Publica*, who held the rank of lieutenant in the forces of the State of Michoacán, to proceed with troops to quell the riot and put an end to the attack upon the Americans. The troops, on arriving at the scene of the riot, instead of dispersing the mob, opened fire on the house as a consequence of which Arnold was killed. The mob renewed the attack, and while the Americans defended themselves as best they could, several members of the mob approached the house from the rear where there were no windows and set fire to the roof. Connelly and Youmans were forced to leave, and as they did so they were killed by the troops and members of the mob. Their bodies were dragged through the streets and left under a pile of stones by the side of the road so mutilated as scarcely to be recognizable. At night they were buried by employees of the Mining Company in its cemetery at Trojes.

3. On the morning following the murder of the Americans, Federal troops arrived and established order. On March 17, the Government of the State was directed by the President of Mexico to take all possible measures to

discover those who were responsible for the murders. Of the thousand or more who made up the mob, court action was instituted against about twenty-nine. Only eighteen of this number were arrested, but the record discloses that several were released on nominal bail, and were not apprehended after their release. Five were condemned to capital punishment, but their sentences were modified. This action of the court was to no avail; when it was taken one had died, and the remaining four left town before they could be arrested. Seven were acquitted. The cases of six others were discontinued, and the charges against the remaining eleven were left open in the year 1887 for prosecution when they might be apprehended.

4. There appears to be no reason to doubt the substantial accuracy of the allegations in the memorial upon which the claim is predicated. Some contention is made in the brief filed by the respondent government to the effect that it is not proved by evidence in the record that the Mexican authorities were chargeable with negligence in the matter of protecting the men who were killed; or that soldiers participated in the assault on the men; or that proper efforts were not made to apprehend and punish the persons participating in the attack. We do not agree with that contention. In reaching conclusions respecting material facts we are confronted by no serious difficulties resulting from absence of or uncertainties in evidence. The riot took place in the day time. About one thousand persons participated. The incidents of the riot were therefore of course well known throughout the town. Pertinent facts are fully revealed by information collected and gathered immediately after the riot, by reports from American diplomatic and consular officers in Mexico, and by communications exchanged between the American Legation at Mexico City and the Mexican Foreign Office. Copies of official Mexican judicial records and other records accompany the Mexican answer and throw considerable light on the character of the various steps taken to bring to justice the guilty persons. It is pertinent to note that counsel for Mexico in oral argument did not challenge the substantial accuracy of the evidence upon which the allegations in the memorial with respect to the occurrences out of which the claim arises are based. However, mention may be made of some of the principal parts of that evidence.

5. Accompanying a despatch of April 2, 1880, from the American Legation at Mexico City to the Secretary of State at Washington (Annex 34), is a lengthy communication sent to the Legation by Arthur B. Kitchener, Director of the Trojes Mining Company. That communication furnishes detailed information with respect to the incidents of the riot as they are described in the memorial, and it contains the statement that the writer and Mr. Stephens had "several witnesses who saw the soldiers later on fire on the Americans." With a despatch of May 18, 1880, from the American Minister at Mexico City to the Department of State (Annex 36), was enclosed another lengthy communication addressed by Mr. Kitchener to the Minister in reply to a request made by the latter for information regarding the steps taken by

Mexican authorities to bring to justice the persons implicated in the murder. Mr. Kitchener furnishes details with regard to the arrest of a number of persons and the release on what he calls "nominal bail" of some of those who had been taken into custody. He mentions two cases in which the bondsmen of men so released were common workmen of no property or position; another case in which the bondsman was a shopkeeper. He expresses great dissatisfaction with the manner in which the investigation of the crime was conducted. Evidence which undoubtedly is of much value in furnishing reliable information concerning the facts relative to the riot is found in a report (Annex 39) transmitted to the Secretary of State at Washington under date of May 16, 1881, by Mr. David H. Strother, American Consul General at Mexico City, who visited Angangueo for the purpose of making an investigation of the murder. Although his investigation was made a year after the riot, it seems reasonable to believe that the facts in relation to the tragedy were so vividly in the minds of persons with whom the Consul General came into contact that he was able to obtain accurate and comprehensive information. From the Consul General's report it appears to be clear that he performed his work faithfully and with the sole purpose of ascertaining the truth. The manner in which he proceeded and the sources of his information may be shown to some extent by the following extract from his report:

> In conducting any investigation of the subject in hand I thought it advisable to conceal my official character and the motive of my visit, believing that I could thus obtain a more full and impartial statement of the facts. In this way I gathered evidence from Mexicans, English and Americans, all agreeing in the main facts and confirming generally the statements we have had heretofore. Some of the persons with whom I conversed were well acquainted with all the principal parties concerned and eye witnesses of some of the facts which they narrated. All told their stories clearly and dispassionately and seemed fairly to express the settled convictions of thinking men on events, which occurring more than a year before had been carefully sifted and conclusively established.

6. With respect to the participation of the soldiers in the attack on the Americans the Consul General said:

> It is believed by those who seem well acquainted with all the circumstances, that the appearance of the troops on the ground in behalf of public order, would of itself alone have been sufficient to have quelled the riot and put an end to all further turbulent and unlawful proceedings, but to the astonishment of all, they at once took position and opened fire on the Americans in the house. This act encouraged the mob to re-open their attack with redoubled fury. The soldiers continued their fire until they had expended their ammunition killing George Arnold by a shot through the head.

7. In submitting certain conclusions at the end of the report Mr. Strother stated:

> That there would in all probability have been no fatal results from the

riot had it not been for the unaccountable and scandalous conduct of the State troops.

8. The American Minister at Mexico City in his despatch of April 2, 1880, reported to his government that upon receiving telegraphic information regarding the murder of the Americans at Angangueo, he brought the matter to the attention of the Mexican Foreign Office in a communication of March 16, 1880, in which he expressed the feeling of assurance that such prompt and energetic measures would be taken by the Mexican Government as the circumstances of the case might require. In an instruction of April 20, 1880 (Annex 35), Secretary of State Everetts directed the Minister to express to the Mexican Government, without any reference to the question of private indemnity in advance of more complete information, the confident expectations on the part of the Government of the United States that nothing would be omitted in the matter of bringing the offenders to the strictest justice according to law. Following the receipt of Consul General Strother's despatch of May 16, 1881, the Department of State, in an instruction dated November 4, 1881 (Annex 40), directed the American Minister at Mexico City to bring to the attention of the Mexican Government claims which had been presented to the Department by relatives of the three murdered men. The Department in this communication emphasized the participation of the troops in the riot and with respect to this point said:

> These troops, at a moment when they had the mob under control, and when the complete quelling of the riot seemed an immediate possibility, in utter disregard of the obligations of their office as preservers of the peace and with wanton and deliberate violation of law, opened fire on the three Americans, instantly killing one and joining with the infuriated mob in the inhuman slaughter of the other two who were fleeing for their lives from their burning cabin, which had been deliberately set fire to over their heads.
>
> It seems almost needless to remark that such conduct on the part of soldiers or police, under orders to preserve the peace and protect the lives and property of peaceable inhabitants, on the plainest principles of international law and independent of the treaty stipulations between the two nations, which are contravened by such proceedings, renders the government in whose service they are employed, justly liable to the government of the men, whose lives were thus wantonly and needlessly sacrificed.

9. Under date of May 15, 1882, the Mexican Foreign Office addressed a communication to the American Legation denying all liability with respect to these claims (Annex 41). The Minister for Foreign Affairs, Señor Mariscal, challenged the right of the United States to intervene in the cases on the ground that the murdered men had not been matriculated under Mexican law. He asserted that there had been no negligence in the matter of giving protection to the men and denied that evidence had been furnished to prove that soldiers participated in the attack on the Americans. A reply to the Mexican Government's note was made at considerable length by the

American Minister in a note of May 27, 1882 (Annex 41). In this communication the Minister referred to the participation in the riot by the Mexican officer and the men under his command as follows:

> The above mentioned officer and soldiers under his charge confessed to having done this, alleging in excuse that they feared the vengeance of the mob had they acted otherwise. A number of the towns people were eyewitnesses of this fact. Amongst others, I may mention the following: Don Guillermo Zercero 2; Diputado de Mineria, an owner of mines and smelting works in the town; Don Justo Lopez, president of the Ayuntamiento of Angangueo; Don Ruperto Menchaca, butcher, well known to the Company and Antonio Alamio, storekeeper, besides many miners and work people of the District. For above a week after the disturbance the above mentioned Mora and soldiers were still at liberty, but were then taken into custody on evidence against them by Don Justo Lopez.

10. In an instruction of September 4, 1882, the American Minister was informed that the Government of the United States did not deem it to be advisable to press the cases further at that time.

11. The claim made by the United States is predicated on the failure of the Mexican Government to exercise due diligence to protect the father of the claimant from the fury of the mob at whose hands he was killed, and the failure to take proper steps looking to the apprehension and punishment of the persons implicated in the crime. In connection with the contention with respect to the failure of the authorities to protect Youmans from the acts of the mob, particular emphasis is laid on the participation of soldiers which is asserted to be in itself a ground of liability. In behalf of the respondent government it is contended that the Mexican Government and the Government of the State of Michoacán acted with due diligence in arresting and bringing to justice all persons against whom a reasonable suspicion of guilt existed; that the charge that some State troops participated in the riot is not proved by the evidence; and that, even if it were assumed that the soldiers were guilty of such participation, the Mexican Government should not be held responsible for the wrongful acts of ten soldiers and one officer of the State of Michoacán, who, after having been ordered by the highest official in the locality to protect American citizens, instead of carrying out orders given them acted in violation of them in consequence of which the Americans were killed.

12. We are of the opinion that the contentions advanced by the United States as to liability on the part of the Mexican Government are sustained by the evidence in the record. Without discussing the evidence at length, it may be stated that the Commission is of the opinion that the record shows a lack of diligence in the punishment of the persons implicated in the crime. Annex 3 accompanying the Mexican answer reveals some interesting information with respect to the prosecution of persons who were arrested. There is not sufficient information before the Commission to warrant us in under-

taking to draw any definite conclusions with respect to certain cases in which prisoners were released and other cases in which severe sentences imposed by the court of first instance were mitigated by a higher court. It may be mentioned, however, that this judicial record shows that seventeen prisoners escaped, some of them while they were at liberty on bail. Citations have been made to evidence with respect to participation of soldiers in the killing of the three Americans. We consider that evidence to be ample proof of such conduct on the part of the soldiers, and touching this point it is pertinent to note that evidence has not been adduced to disprove their guilt. It is also pertinent to note touching this point that some soldiers were arrested but were not sentenced. Evidence before the Commission does not disclose whose weapons killed the Americans, but the participation of the soldiers with members of the mob is established. It cannot properly be said that adequate protection is afforded to foreigners in a case in which the proper agencies of the law to afford protection participate in murder. The claim of Alfred Jeannotat, under the convention of July 4, 1868, between the United States and Mexico, was a case very similar to the present one. Speaking of the participation of soldiers in riotous acts, Umpire Thornton said:

> It has been alleged that in the above-mentioned instance the sacking was done by the released prisoners, and by a mob belonging to the population of the town; but, if it were so, it was the military force commanded by officers who put it in the power of the convicts and incited the mob to assist them in their acts of violence and plunder. It does not appear that without the arrival of the military force, which ought to have protected the peaceable inhabitants of the town, there would have been any inclination to commit such acts of violence. The umpire is therefore of opinion that compensation is due to the claimant from the Mexican Government. (Moore, International Arbitrations, Vol. IV, 3673, 3674.)

13. With respect to the question of responsibility for the acts of soldiers there are citations in the Mexican Government's brief of extracts from a discussion of a subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law. The passage quoted, which deals with the responsibility of a state for illegal acts of officials resulting in damages to foreigners, begins with a statement relative to the acts of an official accomplished "outside the scope of his competency, that is to say, if he has exceeded his powers." An illegal act of this kind, it is stated in the quotation, is one that cannot be imputed to the state. Apart from the question whether the acts of officials referred to in this discussion have any relation to the rule of international law with regard to responsibility for acts of soldiers, it seems clear that the passage to which particular attention is called in the Mexican Government's brief is concerned solely with the question of the authority of an officer as defined by domestic law to act for his government with reference to some particular subject. Clearly it is not

intended by the rule asserted to say that no wrongful act of an official acting in the discharge of duties entrusted to him can impose responsibility on a government under international law because any such wrongful act must be considered to be "outside the scope of his competency." If this were the meaning intended by the rule it would follow that no wrongful acts committed by an official could be considered as acts for which his government could be held liable. We do not consider that any of these passages from the discussion of the subcommittee quoted in the Mexican brief are at variance with the view which we take that the action of the troops in participating in the murder at Angangueo imposed a direct responsibility on the Government of Mexico.

14. Citation is also made in the Mexican brief to an opinion rendered by Umpire Lieber in which effect is evidently given to the well recognized rule of international law that a government is not responsible for malicious acts of soldiers committed in their private capacity. Awards have repeatedly been rendered for wrongful acts of soldiers acting under the command of an officer. (See for example the claim of Frederick A. Newton *v.* Mexico, for the theft of property by Republican troops under Colonel Ríos, and the claim of A. F. Lanfranco *v.* Mexico, for the looting of a store at Tehuantepec by armed men under the command of the *Jefe Politico* of that place—Moore, *International Arbitrations*, Vol. 3, p. 2997; also the interesting case of the German sentry who at the frontier near Vexaincourt shot from the German side and killed a person on French territory, mentioned by Oppenheim, *International Law*, 3d edit., Vol. 1, pp. 218–219; and the opinion of the Commission in the Falcon claim, Docket No. 278.)[1] Certain cases coming before the international tribunals may have revealed some uncertainty whether the acts of soldiers should properly be regarded as private acts for which there was no liability on the state, or acts for which the state should be held responsible. But we do not consider that the participation of the soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty and under the immediate supervision and in the presence of a commanding officer. Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.

15. The respondent government has not denied that, under the convention of September 8, 1923, acts of authorities of Michoacán may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicated on such acts.

16. Claim is made in this case for damages in the amount of $50,000.00.

[1] *Supra*, p. 566.

The Commission is of the opinion that an award may properly be made in the sum of $20,000.00.

Decision

17. The Commission therefore decides that the Government of the United Mexican States must pay to the Government of the United States of America the sum of $20,000.00 (twenty thousand dollars) without interest on behalf of Thomas H. Youmans.

Done at Washington, D. C., this 23d day of November, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

AGNES CONNELLY *et al. v.* MEXICO (Docket No. 270)

Opinion rendered November 23, 1926

Recovery of damages by collateral relatives.

In taking account of the indignity and grief occasioned by the tragic death of Connelly, in which Mexican troops participated, not only his father, but his brothers and sisters were afflicted. In view of the material support contributed by Connelly to his brothers and sisters living with his father, they sustained a pecuniary loss by his death. In fixing the amount of damages it can not be assumed that had Connelly lived he would have continued throughout his lifetime to send money to his relatives.

Counsel: United States, C. L. Bouvé, Agent; Mexico, Oscar Rabasa.

1. Claim for damages in the amount of $50,000.00 is made in this case by the United States of America against the United Mexican States in behalf of Agnes, Alice, Thomas, Mary A., and William Connelly and Ellen Edith Murphy, whose brother, John A. Connelly, together with two other Americans, Henry Youmans and George Arnold, was killed at the hands of a mob on March 14, 1880, at Angangueo, Michoacán, Mexico. The occurrences giving rise to this claim are the same as those underlying the claim of Thomas H. Youmans (Docket No. 271).[1] The conclusions of the Commission with respect to the responsibility of Mexico in the claim of Thomas H. Youmans which are stated in the Commission's opinion in that case are applicable to the instant case, and in disposing of it it is necessary merely to refer to certain questions raised by the Mexican Government with respect to the status of the claimants and the right of the United States to intervene in their behalf.

2. It is alleged by the respondent government (a) that the United States has no standing in this case, since proof of the American citizenship of John A. Connelly, the murdered man, has not been presented, and (b) that, the right of the United States to intervene in this case being assumed, damages can not be recovered in behalf of the brothers and sisters of John A. Connelly

[1] *Supra*, p. 571.

in their own right, since they are collateral relatives who were not dependent on the deceased for support.

3. From evidence in the record, we are satisfied that the American citizenship of the deceased John A. Connelly has been convincingly established. It appears that his parents lived at Lockport, in the State of New York; that an elder brother and two elder sisters were baptized at that place in the years 1852, 1853, and 1855, respectively; that John A. Connelly was born on September 26, 1856, at a place not mentioned and was baptized at Lockport on October 18, 1856. There is no reasonable doubt that he was a native citizen of the United States. It may further be mentioned, however, that there was introduced in evidence the record of the naturalization of Matthew Connelly, father of John A. Connelly, showing that the former was naturalized as an American citizen on June 16, 1855, that is, about a year prior to the birth of the son John.

4. The Commission is of the opinion that by the killing of John A. Connelly not only his father, but other members of his family, brothers and sisters, sustained a pecuniary loss. In taking account, as we deem it proper to do, of the indignity and grief occasioned by the tragic killing of Connelly, in which Mexican troops participated, we are mindful that brothers and sisters, and not the father alone were afflicted. The Commission is aware that it has been held in an international award that collateral relatives of a deceased claimant not dependent on him for support are not to be admitted as claimants in his place (McHugh case; Hale's Report 61–62, 240–241; Moore, 3278–3279); but this situation is not present in this case. And as to the right of collateral relatives of a killed man not dependent on him for support to claim for damages sustained by his death awards differ. Bearing in mind the elements of damages of which international tribunals have taken account in similar cases (see for example, the discussion of this point in the *Di Caro case*, Ralston, Venezuelan Arbitrations of 1903, p. 769) we consider it proper to take cognizance of information contained in the record with respect to material support contributed by Connelly to members of his family. There is evidence to the effect that at the time of his death, four sisters, Mary A., Ellen, Agnes and Alice, aged respectively, 28, 24, 17 and 14 years, and one of his brothers, aged 11 years, were living with their father at his home, and that the deceased sent to his father to be used for the support of his brothers and sisters on an average of $125.00 each month, and that on one occasion he had sent an additional sum of $500.00. However, in fixing the amount of damages it cannot be assumed that had Connelly lived he would have continued throughout his lifetime to send money to his relatives though he did so when the father was alive and several children lived with him.

5. Claim is made in this case for damages in the amount of $50,000.00. The Commission, however, is of the opinion that an award may properly be made in the sum of $18,000.00.

Decision

6. The Commission therefore decides that the Government of the United Mexican States must pay to the Government of the United States of America the sum of $18,000.00 (eighteen thousand dollars) without interest, on behalf of the claimants.

Done at Washington, D. C., this 23rd day of November, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

TEODORO GARCÍA AND M. A. GARZA *v.* UNITED STATES (Docket No. 292)

Opinion rendered December 3, 1926

Fatal shooting by border patrol to prevent escape of alien unlawfully crossing border held wrongful under international law.

There exists among civilized nations an international standard concerning the taking of human life, and it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of firearms. In order to consider shooting on the border by armed officials of either government justified, a combination of four requirements would seem to be necessary:

(a) The act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated;

(b) It should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighborhood;

(c) It should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available;

(d) It should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound or kill.

In no manner can the Commission endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive laws, that the enforcement of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms.

The action by the President of the United States in reversing the conviction of the soldier by court-martial and restoring him to duty constitutes no foundation for the allegation of a denial of justice.

Dissenting opinion by NIELSEN, Commissioner.

Counsel: United States, C. L. Bouvé, Agent; Mexico, Eduardo Suárez.

1. This claim is presented by the United Mexican States against the United States in behalf of Teodoro García and María Apolinar Garza, Mexican nationals, father and mother of Concepción García, a girl of Mexican nationality, who on April 8, 1919 between 9 and 10 a. m. was killed by a shot from the American side of the Río Bravo del Norte or Río Grande, while crossing from the American to the Mexican side on a raft propelled by two men in the water, in the company of her mother and her aunt, not far from Havana, Texas, the father, a laborer, looking on from the Mexican bank. An American officer, Second Lieutenant Robert L. Gulley, 4th United States Cavalry, was that morning on duty on the border with an

armed patrol of four men, had discovered the raft in contravention of the laws, and fired in order to make them halt, and unfortunately had mortally wounded the young girl who died immediately thereafter. Having been tried before a court-martial, he had been sentenced on April 28, 1919 to be dismissed from the military service, but the commanding officer at San Antonio, Texas, in reviewing and approving the sentence, had used his right to reserve the case for the decision of the President of the United States, and the President, acting on the advice of the Board of Review, the Judge Advocate General and the Secretary of War, had reversed the findings of the court-martial, released the lieutenant from arrest and restored him to duty (September 1919). It is alleged that the United States is liable both for a wrongful killing by one of its officials and for denial of justice; that the claimants sustained damages in the sum of 50,000 Mexican pesos; and that the United States ought to pay them the said amount, with interest thereon.

2. Nearly all of the facts in this case are undisputed. The raft left the Mexican side in the morning of the said day to take from the opposite side García's daughter who had been for about three years in the United States, but had fallen ill and was to be taken home, and García's wife with her sister, both of whom had been on the other side for a couple of days. All members of the party were unarmed. They crossed the river on a place where such crossing was strictly forbidden by the laws of both countries. It is not doubtful from the record that at least Teodoro García, the girl's father, knew perfectly well that this crossing was a delinquency and a risky act. Nor is it doubtful that the American officer had been especially instructed to enforce on the river border different sets of acts and/or regulations which forbade crossing, smuggling, and similar offenses. Less than two months before, however, on February 11, 1919, a military regulation had been promulgated, reading in its paragraph 7: "but firing on unarmed persons supposed to be engaged in smuggling or crossing the river at unauthorized places, is not authorized." Less than three weeks before, troop commanders had been told they would be held responsible that the provisions of said bulletin be "carefully explained to all men." The court-martial decided that this bulletin had been violated by the officer. The President of the United States gave a contrary decision after submission of reports which held, among other things, that the bulletin had not been violated. The only point of some importance on which the evidence differs relates to the question, whether the raft at the time of the shooting was in the Mexican or in the American part of the stream; but for the decision to be given by the Commission this question is not material.

3. The killing and its circumstances being established, the Commission has to decide, whether the firing as a consequence of which the girl was mortally wounded constituted a wrongful act under international law. It is not for this Commission to decide whether the author could or should

be punished under American laws; therefore, it is not for the Commission to enter upon the field where the American court-martial, the reviewing general at San Antonio, Texas, and the President of the United States found themselves. The only problem before this Commission is whether, under international law, the American officer was entitled to shoot in the direction of the raft in the way he did.

4. The Commission makes its conception of international law in this respect dependent upon the answer to the question, whether there exists among civilized nations any international standard concerning the taking of human life. The Commission not only holds that there exists one, but also that it is necessary to state and acknowledge its existence because of the fact that there are parts of the world and specific circumstances in which human practice apparently is inclined to fall below this standard. The Commission, in its opinion on the Swinney case (Docket No. 130),[1] speaking of the Rio Grande, stated already: "Human life in these parts, on both sides, seems not to be appraised so highly as international standards prescribe." Nobody, moreover, will deny that in time of active war the value of human life even outside of battlefields is underrated. Authoritative writers in the field of domestic penal law in different countries and authoritative awards have emphasized that human life may not be taken either for prevention or for repression, unless in cases of extreme necessity. To give just two quotations on the subject: the famous Italian jurist Carrera does not hesitate to qualify as an abuse of power excessive harshness employed by agents of the public force to realize an arrest, and adds that it is to such abuse that the sheriffs of Toscane owe their sad reputation (*Programma del corso di diritto criminale*, 8th edition, Vol. V, 1911, pp. 114–115; compare for an historic development Vol. I, 1906, pp. 56–60); and in State *v.* Cunningham, 51 L. R. A. (N. S.) 1179, an American court said:

> The highest degree of care is exacted of a person handling firearms. They are extraordinarily dangerous, and in using them extraordinary care should be exercised to prevent injury to others. . . . We unqualifiedly condemn this practice of the reckless use of firearms. Officers should make all reasonable efforts to apprehend criminals; but this duty does not justify the use of firearms, except in the cases authorized by law. Officers, as well as other persons, should have a true appreciation of the value of a human life.

5. If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of firearms. On the part of American authorities this duty for the American-Mexican border was recognized in Bulletin No. 12, May 30, 1917 ("Particularly will be punished such offenses as unnecessary shooting across the border without authority"), by paragraph 7 of our Bulletin No. 4, February 11, 1919 ("but firing on unarmed

[1] *Supra*, p. 562.

persons supposed to be engaged in smuggling or crossing the river at unauthorized places, is not authorized"), and by paragraph 20 of General Order No. 3, March 21, 1919 ("Troop Commanders will be held responsible that the provisions of Bulletin No. 4 . . . , February 11, 1919, is carefully explained to all men"). In the field of international law the said principle has been recognized in the fourth Hague Convention of 1907, where Article 46 of the "Regulations respecting the laws and customs of war on land" provides that in occupied territory "the lives of persons . . . must be respected," Article 3 of the treaty itself adding that the belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation and shall be responsible for all acts committed by persons forming part of its armed forces. In order to consider shooting on the border by armed officials of either government (soldiers, river guards, custom guards) justified, a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighborhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound or kill. In no manner the Commission can endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive laws, that enforcement of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms.

6. Bringing the facts of the present case to the test of these principles, the Commission holds that, in the first place, the delinquency of crossing the river (not that of anything else or more) was sufficiently established. In the second place, the record only shows that the officer expected the delinquents to be engaged in importing barrels of the native liquor called "mezcal," all other suppositions as to atrocious acts they might have been perpetrating being mere inferences; a proportion between the supposed delinquency and the endangering of lives is therefore not established by the record. Remarks in the record relative to the "secrecy and speed with which the crime was committed," to the fact of its occurrence "at a hidden point on the border" ("a secluded and secret place") and to the status of war still existing at the time between the United States and Germany (April 1919) cannot either supply new facts, or outweigh the fact that the crossing occurred in broad daylight, between 9 and 10 a. m.; it is, moreover, stated in the record by a Mexican district judge that "the inhabitants or residents of both sides of the river . . . cross every day or very frequently to the other side" without looking "for the authorized shallow parts or passages, some of which are

situated thirty or forty kilometers from their place of residence." In the third place, it appears from the record that the lieutenant did what he could to reach the place where the raft would probably land on the American bank of the river, so as to be able to arrest them without having resort to firing, but that the conditions of the bank did not allow him to be there in time and that hailing was impossible; the Commission has a full comprehension of the difficulties presenting themselves to an officer who in a case like this one has instantaneously to decide what to do. In the fourth place, however, the statement that the firing merely intended to give notice to the culprits of the officer's intention to investigate their business or to arrest them does not explain why the firing took place in so dangerous a way; the record showing that while persons were "swimming in the water and clinging thereto" (to the raft), he shot in the water quite near the raft, and that the child was wounded by "one of the first shots," the lieutenant himself recognizing that he "would not have fired in that direction if he had known women and children were on the raft." The allegation made by Lieutenant Gulley that "he knew nothing about Bulletin No. 4" can have no weight with the Commission, unless in so far as it might show that he considered himself as not having measured up to the requirements of said bulletin.

7. The Judge Advocate's report of September 18, 1919, which apparently was the basis of the President's decision of said month would seem to interpret Bulletin No. 4, February 11, 1919, so as to read that firing on delinquents is not authorized in case the official knows or reasonably should assume that the delinquents are unarmed, but that such firing is authorized in case the official sees or is justified in assuming that they are armed, the presumption being in favor of their carrying firearms. In case this interpretation had been incorporated in the judicial decision emanating from the President of the United States, or if that interpretation were indispensable to explain the President's decision, the Commission would feel bound by this interpretation of a municipal enactment by the highest municipal decision of a judicial nature in this field. But assuming it to be a right interpretation as it stands although not specifically endorsed by the President, it could not change in any way the facts in the present case; for in applying its principles to this claim the Commission left aside the question whether the claimants were armed or not.

8. The allegation of a denial of justice committed by the United States has no foundation in the record. In order to assume such a denial there should be convincing evidence that, put to the test of international standards, the disapproval of the sentence of the court-martial by the President acting in his judicial capacity amounted to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. None of these deficiencies appears from the record.

9. The record leaves no doubt but that the claimants, at least Teodoro García, realized their acting in contravention of laws and regulations which had been effective since about two years. Though this knowledge on their part cannot influence the answer to the question, whether the shooting was justified or not, it ought to influence the amount of damage to which they are entitled. In fixing this amount the Commission does not consider reparation of pecuniary loss only, but also satisfaction for indignity suffered. An amount of $2,000, without interest, would seem to express best the personal damage caused the claimants by the killing of their daughter by an American officer.

Decision

10. The Commission accordingly decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States $2,000 (two thousand dollars), without interest, in behalf of Teodoro García and Maria Apolinar Garza.

Done at Washington, D. C., this 3rd day of December, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.

G. FERNÁNDEZ MACGREGOR,
Commissioner.

DISSENTING OPINION

I regret that I feel constrained to dissent from the views of the other two Commissioners with respect to this claim. A very small award was rendered in the case. There are instances in which an arbitral tribunal, after reaching the conclusion that there was no liability in a given case, has recommended that compensation be made by the respondent government as an act of grace. In the present case, in which I believe there is no legal liability on the part of the respondent government, I should have been glad to join in a recommendation to the Government of the United States to make compensation to the claimants in an amount larger than that of the pecuniary award. I am stating my views with regard to the law applicable to the case, first, because I deem it to be desirable to analyze the charges made with respect to the proceedings conducted in connection with the trial of the army officer who shot the girl whose death gave rise to this claim, and, second, because my views apparently differ from those of the other Commissioners not only with respect to the law applicable to this case, but also with respect to the functions of the Commission in acting on a case of this character.

The claim made by the Mexican Government is based on two grounds: (1) that there was a denial of justice, as that term is understood in international law, in the action of the President of the United States in improperly setting aside the sentence of the court-martial which found an officer of the American

army guilty of charges preferred against him, and (2) that the United States is liable for a wrongful act committed by that officer.

In the Mexican memorial it is stated that "from a constitutional standpoint, the power which the Hon. President of the United States has to reverse the verdict of the court-martial, by declaring Lieut. Gulley not responsible for the crime of homicide, contrary to all the evidence on record in the proceedings, is not open to discussion; but it is beyond doubt that this decision is not conformable to the universal principles of justice, but only to those questions of expediency of a political nature, which while they assuredly comply with constitutional requirements, yet none the less transgress the law of nations." And in the Mexican reply it is stated that "the decision given by the President of the United States of America, to the effect that Lieutenant Gulley was not responsible for the death of the little girl named Concepción García, however it may be in accordance with the constitutional and military laws of the latter country, violates the principles of universal justice accepted by all nations and which therefore are a part of international law." These are very serious charges, and I am of the opinion that they are the result, in part at least, of a misconception of the military law governing the proceedings in the case of Lieutenant Gulley. In the oral argument of counsel for Mexico a somewhat different aspect was given to the President's action, which was spoken of as a pardon granted to the accused.

From the American answer with its accompanying exhibits the facts in relation to the shooting of Concepción García and the trial of Lieutenant Gulley may be briefly summarized as follows:

On the morning of April 8, 1919, Lieutenant Gulley was in charge of an armed patrol consisting of himself and four men. He was under instructions to prevent smuggling and crossing of the Rio Grande at unauthorized points, to investigate all suspicious persons and vehicles, to allow no one with firearms south of a certain military road and to report any unusual happenings. While on duty he thought he saw a raft put out from the Mexican side of the river coming towards the American side at a distance of from 2,500 to 2,800 yards from where he was. As the undergrowth was thick at the point where the raft appeared to be and prevented a good view, Gulley proceeded with his patrol about 400 yards down the river from whence he saw the raft about four or five yards from the American side moving towards the Mexican side. The river at this point is about 75 to 100 yards in width. The distance was too great to permit Gulley to see persons on board. The distance between Gulley and the raft, estimated at from 1,500 to 2,400 yards being too great to enable him to hail persons upon it, he fired about twelve shots in the direction of the raft, stating at the time he did so, that he did not desire to hit any one but merely to frighten persons on the raft, so as to cause them to return to the American side in order that he might arrest them. The sights of the rifle were set first at 1,000 yards, one-half the estimated distance to the raft, then at 1,150 yards, and finally at 1,450 yards, about three-fourths of the

estimated distance, and the shots were seen to strike the water between Gulley and the raft and around the raft.

At the time of the shooting there were on the raft the wife of Teodoro García, her sister and two children of García, and in the water propelling the raft or swimming with it were two men and two women, all Mexicans, returning from the United States. The business in the United States of the four women and the children or the reason for crossing the river was not disclosed by the evidence. The two men had been engaged by García in the morning to propel the raft from the Mexican to the American side and return. One of the children, Concepción García, had been on the American side for three years and was ill when she was returning home. Those in control of the raft, although they heard the shots and saw the bullets striking, pursued their way towards the Mexican side. One of the bullets, either ricocheting from the water or coming directly from the gun fired by Gulley, struck the child, Concepción García, in the head inflicting a mortal wound from which she died in Mexico. The accused did not know any of the persons on the raft, and neither he nor any of his men suspected at the time of the shooting that some one on the raft had been killed.

Lieutenant Gulley was brought to trial before a general court-martial which convened at McAllen, Texas, April 28, 1919. Two charges were preferred against him: (1) that he "with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation" killed Concepción García, and (2) that he violated standing army orders by firing on unarmed persons crossing the Rio Grande at an unauthorized place. Under the first charge he was found guilty of manslaughter within the meaning of the 93rd Article of War, and he was also found guilty of the second charge, and he was sentenced to be dismissed from the Army. The reviewing authority (the Commanding General) approved the sentence, but conformably to an existing Army regulation and the 51st Article of War, he transmitted the record of the trial to the so-called "Board of Review" which rendered an opinion to the effect that Lieutenant Gulley was not under the law guilty of the charges preferred against him. This opinion, in which it is shown several high officers participated, was signed by the Judge Advocate General of the Army and approved by the Secretary of War, and was, together with the record of the trial before the court-martial, transmitted to the President of the United States pursuant to the provisions of the 51st Article of War. The President disapproved of findings of guilty and the sentence imposed on Lieutenant Gulley and ordered his release from arrest and his restoration to duty. Upon this action of the President the Mexican Agency bases the charge of a denial of justice.

By the 48th Article of War (39 Stat. L. 658) a sentence extending to the dismissal of an officer requires, in time of peace, confirmation by the President. In time of war such a sentence may, conformably to Article 51 of the Articles of War, be suspended by the competent authority pending action

in the case by the President to whom, when this procedure is followed, a copy of the record of the trial must be sent. If it can be imagined that in any civilized country a law could exist authorizing the setting aside of a sentence of dismissal or a sentence of death by the chief magistrate of the nation irrespective of the guilt of the accused person under the law, the records accompanying the answer in the present case obviously show that no such action was taken by the President. While in time of war a commanding general may order the execution of a sentence of dismissal, he is authorized to suspend the sentence pending action by the President, and when such a course is adopted, it is clear that the President, under the system of military justice of the United States, acts in a judicial capacity, as a court of last resort, just as he so acts in time of peace, when sentences of this kind must be submitted to him before they are carried into execution. See on this point Runkle *v.* United States, 122 U. S., 543, 558. In the present case there were laid before the President as a court of last resort not only the record of the court-martial proceedings, but an opinion of the Board of Review signed by the Judge Advocate General of the Army and approved by the Secretary of War. To my mind it must of course be taken for granted that the President concurred in that opinion, in which the conclusions are submitted that Lieutenant Gulley did not commit manslaughter as defined by American law and did not violate an army regulation forbidding the firing on unarmed persons.

I am of the opinion that the Commission is bound by the President's interpretation of American law with respect to these two points. I take it that international law recognizes the right of the authorities of a sovereign nation, particularly a court of last resort, to put the final interpretation upon the nation's laws. Possibly there may be an exception to this general rule in a case where it can be shown that a decision of a court results in a denial of justice, that is, when a decision reveals an obviously fraudulent or erroneous interpretation or application of the local law. Domestic laws may contravene the law of nations, and judicial decisions may result in a denial of justice, but assuredly it is a well-recognized general principle that the construction of national laws rests with the nation's judiciary. In the opinion of the two other Commissioners some question seems to be raised whether it was necessary for the President, in order to reach the decision which he gave, to put an interpretation on Bulletin No. 4 of February 11, 1919, with respect to firing on unarmed persons. The opinion of the Board of Review deals in detail with the interpretation of this army regulation and reaches the conclusion by what appears to me to be sound reasoning that it was not violated by Lieutenant Gulley. Since, if in the opinion of the President the regulation had been violated the sentence of the court-martial could not have been disapproved, which it was, obviously the President put upon this regulation the construction that it was not violated by Lieutenant Gulley, however meagre may be the record of his specific action. The grave charge

made in the oral and written arguments advanced in behalf of the Mexican Government that the action of the President was a denial of justice, in that a proper sentence of a lower court was deliberately set aside as a matter of expediency and contrary to all the evidence in the records of the proceedings, probably requires no more discussion than that given to it in the opinion of the two other Commissioners. I have, however, very briefly indicated the character of the careful proceedings that were taken in this case. A denial of justice can be predicated upon the decisions of judicial tribunals, even courts of last resort. But attempts to establish a charge that a court of last resort has acted fraudulently or in an obviously arbitrary or erroneous manner are very infrequently made. This Commission has in the past broadly indicated its views as to what is required to establish such a charge. It is probably unnecessary in view of what has already been said with regard to the proceedings in this case to say anything more for the purpose of showing that the decision of the court-martial imposing a sentence of dismissal on Lieutenant Gulley was not set aside merely as a matter of expediency, or that the construction and application of the law by the court of last resort was neither fraudulent, nor arbitrary, nor obviously erroneous, nor an act of expediency.

The second point raised in the case before the Commission is more difficult. The charge of a denial of justice being disposed of, there remains for consideration the issue whether the deed committed by Lieutenant Gulley for which he was tried is one for which his government is, under international law, liable to respond in damages. There is no question with regard to the rule of international law that a nation is responsible for acts of soldiers which are not acts of malice committed in their private capacity. See the opinion of the Commission in the claim of Thomas H. Youmans, Docket No. 271, and the cases therein cited. The Commission must therefore consider the question as to what are the kinds of acts of soldiers for which a nation is responsible. International law specifically defines certain acts of representatives or agencies for which a government must answer, such as looting or wanton or unnecessary destruction of property by soldiers, and malicious or wanton taking of human life. Acts of this kind are generally also condemned and punishable under domestic law. Well defined responsibility may also be illustrated by the liability for damages caused by public vessels. In cases of collisions between public and private vessels awards have been rendered against a nation because public vessels have been found guilty of faulty navigation under the applicable rules of admiralty law. In cases of collision in territorial waters it has been asserted that the law applicable to the determination of the question of fault was the *lex loci delicti commissi*. See *The Canadienne* claim and *The Sidra* claim, American and British Claims Arbitration under the special agreement of August 18, 1910, Agent's Report, pp. 427, 452.[1] The precise question before the Commission is whether the

[1] Printed in this JOURNAL, Vol. 8 (1914), p. 655, and Vol. 16 (1922), p. 110.

act of Lieutenant Gulley, held by the court of last resort not to be in violation of the law of his country, is one for which his government is liable under international law. Whether the United States is so liable must, in my opinion, be ascertained by a determination of the question whether American law sanctions an act that outrages ordinary standards of civilization. It is conceivable that domestic laws, just as they may contravene international law in their operation on property rights of aliens may, by their sanction of personal injuries under certain circumstances, offend broad standards of governmental action the failure of observance of which imposes on a nation, as arbitral tribunals have frequently held, the liability to respond in damages under international law. A fairly close analogy to the question presented for determination in this case may be found, I think, in cases that have frequently come before international tribunals involving gross mistreatment of aliens during imprisonment. The Commission has in other cases indicated a standard by which it considers it must be guided in making judicial pronouncements with respect to alleged wrongful acts of authorities against private persons. It has expressed the view that it cannot render an award for pecuniary indemnity in any case in the absence of evidence of a pronounced degree of improper governmental administration. It has made awards dismissing cases in the absence of such evidence and has rendered pecuniary awards in cases in which it considered that such evidence was found in the record.

In the present case the opinion of the majority seems to me to be grounded on a different theory as to liability. It is said in the opinion that the "only problem before this Commission is whether, under international law, the American officer was entitled to shoot in the direction of the raft in the way he did;" and that the Commission "makes its conception of international law in this respect dependent upon the answer to the question, whether there exists among civilized nations any international standard concerning the taking of human life." It is stated that, in order to consider shooting on the border by armed officials of either government justified, "a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighborhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound or kill." It is further stated that "If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of firearms." To my mind it is not the duty of an international tribunal either to attempt in effect to formu-

late certain rules of criminal jurisprudence or to undertake to "obviate" acts which a tribunal may regard to be objectionable. In my opinion, it is the duty of an international tribunal to determine whether a nation must respond in damages for acts alleged to be wrongful, and in discharging this duty a tribunal must take cognizance of and give effect to rules of law, and in cases in which unfortunately concrete rules are wanting, give proper application to principles. It must apply law to facts and pass upon acts of omission or commission in the light of rules or principles. And as I have heretofore observed, since the Commission cannot properly challenge the construction put upon penal laws of the United States by the court of last resort in connection with the case of Gulley, it must determine whether laws under which his action was not punishable obviously fall below the standard of similar laws of members of the family of nations.

A very apposite case with respect to this point is the Cadenhead case decided May 1, 1914, by the tribunal created by the special agreement concluded August 18, 1910, between the United States and Great Britain (Agent's Report, p. 506).[2] I do not agree with the statement in the opinion rendered by the two other Commissioners as to the decision of the tribunal. It is said that the claim was dismissed "because no personal pecuniary loss or damage resulting to relatives or representatives had been proven." That point is mentioned in the tribunal's opinion. But the fundamental point in the case is concerned with the military law as construed by a military court under which a sentinel who accidentally shot a British subject while aiming at an escaping military prisoner was held not liable to punishment. Counsel for Great Britain severely criticized the army regulations under which shooting at an escaping prisoner in the manner disclosed by the record was permitted. With respect to what seems to me to have been the controlling point in the case, the tribunal said (pp. 506–507):

> His Britannic Majesty's Government contend that this soldier was not justified in firing upon an unarmed man on a public highway, that he acted unnecessarily recklessly, and with gross negligence, and that compensation should be paid by the Government of the United States on the ground that under the circumstances it was responsible for the act of this soldier.
>
> The question whether or not a private soldier belonging to the United States Army and being on duty acted in violation of or in conformity with his military duty is a question of municipal law of the United States, and it has been established by the competent military court of the United States that he acted in entire conformity with the military orders and regulations, namely, section 365 of the Manual of Guard Duty, United States Army, approved June 14, 1902.
>
> *The only question for this Tribunal to decide is whether or not, under these circumstances,* the United States should be held liable to pay compensation for this act of its agent.
>
> It is established by the evidence that the aforesaid orders under which

[2] Printed in this JOURNAL, Vol. 8 (1914), p. 663.

this soldier, who fired at the escaping prisoner, acted, were issued pursuant to the national law of the United States for the enforcement of military discipline, and were within the competency and jurisdiction of that Government.

It has not been shown that there was a denial of justice, or that there were any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and has no greater rights than a national of that country. [Italics mine.]

The last clause of the last paragraph above quoted may not be very happily worded, but I do not think that the learned tribunal meant to give expression to the view that domestic laws can not contravene international law.

Domestic laws may by their operation on property rights of aliens contravene international law. And in any case in which an international reclamation is predicated upon such an infringement of the law of nations it is of course not a defense to say that a court of last resort has properly construed a law to authorize action against which complaint is made. But in reaching a conclusion whether an international delinquency has been committed in any such case, in which the decision of the court as to the meaning of the law is accepted as final, it is proper to determine whether the law has authorized or sanctioned a wrongful act. As I have observed, it is conceivable that domestic law by its sanction of personal injury may, under given circumstances, offend broad standards of governmental action which civilized nations may be expected to observe. And in a case involving an alleged personal injury permitted by domestic law of a nation, it is a proper test of the nature of the alleged wrongful act to compare the law of that nation with similar laws of other nations.

No attempt was made by counsel for the Mexican Government to make a comparison of the laws of the United States with the laws of other countries, not even with the laws of Mexico. Certain precedents were cited by counsel which it was argued furnish authority for a pecuniary award in the present case, among them the tribunal's decisions in the claims of Jesse Walter Swinney and Nancy Louisa Swinney,[3] Docket No. 130, and Dolores Guerrero Vda. de Falcon,[4] Docket No. 278, and the shooting in 1915 of two young Americans by Canadian soldiers in Canadian waters at Fort Erie. In my opinion none of these cases has any value in showing liability on the United States in the instant case.

In the Swinney case, a young man in a row-boat, not engaged in committing any offense, was shot by Mexican officials from the Mexican shore of the Rio Grande because, as was alleged, he did not respond to an order to come over to the Mexican side. On being hailed he explained that he was engaged in no wrong-doing. In the Falcon case the record disclosed that a soldier testified that he and a companion deliberately shot at unarmed naked persons

[3] *Infra*, p. 562. [4] *Infra*, p. 566.

swimming in the Rio Grande, one of whom was killed. The shooting which took place in Canadian waters was directed at two young men who were thought to be engaged in hunting ducks out of season. It seems reasonably clear that the men could have been apprehended without the use of firearms, and that, if they failed to respond to an order to come to the shore, they took but a few strokes in their boat before they were shot, one being killed and one seriously injured. In a note addressed by Secretary of State Bryan to the British Ambassador at Washington it was stated that the offense for which the arrest of the two men was sought was a minor one; that no resistance was offered or violence threatened by the injured men; that the killing and wounding were inflicted intentionally, or, if not, through the gross and culpable negligence of the officers and soldiers in the most reckless manner in which they used their arms; and that the actions of the soldiers were without justification or excuse. It may be pertinent to note that even in these circumstances, the British Government did not admit liability, but stated that "as an act of grace suitable compensation should be made to relatives of the deceased and to the injured man." And although the United States requested compensation, the British Government, instead of making such compensation to the United States, effected a private settlement with the injured persons. (Foreign Relations of the United States, 1915, pp. 415–423).

In my opinion the very deplorable act committed by Lieutenant Gulley for which the United States is held responsible, has not been accurately described in the written or oral argument advanced by the Mexican Agency nor in the opinion of the two other Commissioners.

In discussing the available evidence with regard to the shooting of the little girl by Lieutenant Gulley, it is pertinent to bear in mind that we have evidence of two kinds: first, that accompanying the answer consisting in the main of the lengthy opinion of the Board of Review analyzing the law applicable to the case, and the proceedings before the court-martial, including the evidence produced before the court, and second, the record of proceedings before Mexican judges in the State of Tamaulipas, which accompanies the Mexican memorial.

In the opinion of the two other Commissioners brief quotations are made from the Mexican records to the effect that inhabitants on both sides of the river frequently crossed without looking for authorized shallow parts or passages. On this point, however, it seems to me that it is also pertinent to note that a judge states that "it is well known . . . that on account of the war between the United States of America and Germany, there were taken by the former nation drastic measures on its frontiers to avoid the entrance of spies, among which measures was that of having patrols of American soldiers survey the length of the Bravo" and "*that in spite of such orders*" (italics mine) residents of Mexico "have defied the perils and dared to cross to the American side without a permit or passport." A Mexican judge before whom a number of Mexicans appeared conducted an investigation as a result

of which it may be said that he in a sense found Lieutenant Gulley to be guilty of what he called the "crime of homicide" also describing the shooting as "wickedness or as an atrocity." Before the court-martial there appeared the defendant, of course, and also both American and Mexican witnesses.

It is stated in the Mexican brief (p. 2) that Mexican witnesses all agreed that the soldiers on the American side "fired for no reason whatsoever, and thus killed the child." And in the Mexican reply it is stated that, although technically a state of war between Germany and the United States existed at the time of the shooting, it is evident that the persons who accompanied the little girl who was killed "could not have had the intention of crossing the Rio Bravo for the purpose of causing harm or injury to the United States, for as it is proved by the testimony of the witnesses before the American authorities, found in Annex 1 of the memorial, the sole purpose of the family of Concepción García was to return from the American side, where they were, to the Mexican side of the river, and it was only with this purpose that the temporary raft which served to take them across was made." Leaving aside discussion of the instructions which Lieutenant Gulley had with respect to the enforcement of laws and regulations incident to a state of war, it is very pertinent to remark with regard to this statement in the reply that of course the officer had no knowledge as to who were on the raft or what their purposes were. He was about a mile away when he first saw the raft. He rode hurriedly towards it. He was unable to challenge the persons on board by calling to them. While he clearly had no knowledge as to the mission of the persons propelling the raft, it is proper to bear in mind that he undoubtedly had information with regard to conditions on the border such as may be briefly indicated by quoting from a report of the Commissioner General of Immigration of the United States. In one portion of this report which was made at a time when vigilance on the border was not considered to be as imperative as it was when the shooting occurred, the Commissioner quotes the following from the report of an inspector on the border:

> There is little difficulty in smuggling an alien from Mexico across the line into this country, or in the alien entering unassisted, for that matter. The river is not wide at certain seasons of the year and in some places it becomes a mere trickle. This office estimates that there are at least 100 persons living on the Mexican side opposite points in this jurisdiction who earn their living chiefly by operating illegal ferries and bringing aliens to the United States. The work of the officers here in the past two years in apprehending and destroying boats used as ferries has largely forced them to abandon their large boats made of lumber and of galvanized sheet iron and to resort to "patos," as they are known among the smuggling fraternity, made of a willow framework tied with willow withes and covered with a cheap canvas or wagon sheet. This canvas can be tied on or taken off the frame in a moment, and then carried under a man's arm. The frame can easily be hidden in the brush, and if it should be found and destroyed, 15 minutes'

> work with a machete (and no one ever saw a Mexican of this class without a machete) will construct another.
>
> These illegal ferrymen oftener than not own a small farm on the river. When an alien, Mexican or European, gentleman, criminal, or bolshevik—it makes no difference—wants to cross, this ferryman merely removes his boat cover from his wagon or haystack where it serves him between times, proceeds to the river and pulls his frame from the brush where it has been hidden, ties on the cover, places it in the water, and is ready to, and actually does take his passengers, and often a few cases of contraband liquor also, to this country. Before placing his boat in the water he carefully spies out this side, and probably calls to some "piasano" on this side if one is in sight, and ascertains that no "gringo" officers are in that vicinity. Any Mexican resident on this side will cheerfully abandon his work and spend a day if necessary watching for officers, to aid this boatman, with whom he is always in sympathy, and also for the reason that this kind of work does not call for much effort. In spite of the inhibitions of section 8, or of any other section, which the ferryman is probably ignorant of and which, in any event, he would cheerfully ignore, he more often than not successfully lands his passengers and returns to the other side and safety, and his passengers go their way. (Annual Report, 1924, pp. 16–17.)

In another portion of the report the Commissioner says:

> This work of the mounted or patrol inspectors is attended by considerable hardship and much danger, as it is often necessary for them to remain on duty long hours without opportunity for rest or sleep, in inclement weather, and the smugglers, who very frequently transport intoxicating liquor or narcotic drugs with the aliens, are desperate characters. They go armed and shoot at the command to halt in the name of the law, preferring to commit murder rather than be apprehended and face the probability of serving a prison sentence. Previous annual reports have related the details of the killing and wounding of immigration officers by smugglers. (*Ibid.*, p. 19.)

In discussing acts of soldiers for which a government may be held liable, the Mexican brief cites an extract from a note addressed by Secretary of State Frelinghuysen to the American Minister in Peru under date of December 5, 1884, with regard to the shooting of an American citizen in Peru by a Peruvian soldier. It is pertinent to note with regard to the character of acts of this kind for which a nation may be held responsible that Mr. Frelinghuysen describes the shooting as "an act of outrageous violation, by an agent of the Government while in its line of his duty, of a right which it was his business to protect." In my opinion, Lieutenant Gulley's act, however deplorable it is—and there may be reason to consider it indiscreet—does not come within the category of acts such as that described by Secretary of State Frelinghuysen. It is stated in the brief (p. 15) that "even granting for purposes of argument that the soldier would not be guilty of the crime, and that really the orders prohibiting him from firing on unarmed persons would be unknown to him, still it could be held that the responsibility of the United States can be clearly established in international law." In support

of this contention citation is made to an account in Moore's Digest of International Law of the killing by Chinese soldiers of Lewis L. Etzel, an American war correspondent, and the offer of the Chinese Government to pay an indemnity of $25,000 Mexican currency. The account of this case is very briefly given, and it is pertinent to note that the killing is described as an act of "criminal carelessness." Citation is further made in the brief of a request made by the United States of the Honduran Government for the payment of an indemnity of $10,000 to the relatives of Frank Pears, an American citizen, who was shot in Honduras in 1899 by a sentinel. It is proper to note with respect to this case that the United States after investigation declared that the killing of Mr. Pears "could be regarded as nothing but the cruel murder of a defenseless man, innocently passing from his office to his house." Certainly the act committed by Lieutenant Gulley cannot be regarded as "cruel murder," and after a study of the elaborate opinion of the Board of Review in which evidence and law are considered to my mind with great care and accuracy, I do not believe that the shooting can properly be described as "criminal carelessness," although I am inclined to conclude from such evidence as is available that the officer might have acted with greater discretion and prudence.

It seems to me that the statement in the opinion of the two other Commissioners to the effect that "the record only shows that the officer expected the delinquents to be engaged in importing barrels of the native liquor called 'mescal,' all other suppositions as to atrocious acts they might have been perpetrating being mere inferences," fails to take account of important matters in the record to which the Board of Review attached considerable weight in arriving at its conclusions. It may be that smuggling was the principal thing which Lieutenant Gulley had in mind in endeavoring to arrest persons on the raft. It is proper, however, to bear in mind that the Board of Review calls attention to at least three kinds of laws, the enforcement of which was enjoined on patrols, namely:

1. Legislation enacted in 1918 (40 Stat. L. 559) with respect to restrictions on the entry into or departure from the United States by aliens. It could not of course be expected that legislation of this kind would be repealed many months before the Treaty of Versailles had been signed. A portion of it relating to the entry of aliens into the United States is still in effect (41 Stat. L. 1217) and I assume that similar legislation is generally in force throughout the world today.

2. Legislation with respect to prohibition on the importation of arms and ammunition into Mexico (37 Stat. L. 630).

3. Legislation regarding matters relating to immigration and smuggling.

In discussing the position in which Lieutenant Gulley was placed, the Board of Review deemed it to be proper also to take cognizance of information which is stated in the board's opinion as follows:

> It was a matter of common knowledge that propaganda in aid of war

> against the United States by the German Government, as well as organized efforts to procure information of military and other value, had been actively carried on by persons who, having their seat of operations in Mexico, had been crossing and re-crossing the border for this purpose. The safety of the whole people was involved in seeing that all such acts were suppress[illegible]nd the offenders brought to justice.

To be sure hostilities between the United States and Germany were suspended in April, 1919, but the conclusion of peace was far distant, and it seems to me that the Board of Review acted properly in giving at least some consideration to the duties devolving upon a soldier during the existence of a state of war.

It was enjoined upon troops engaged in patrol duty to consider themselves always on duty, that patrolling was very important and must be performed in the most painstaking manner, and that perfunctory patrols are useless.

Lieutenant Gulley saw persons violating the law of the United States—and it is not disputed that this was knowingly done. He was not in a position to apprehend them; he could not hail them by calling to them; and they did not stop although he repeatedly fired. Unless his testimony and that of soldiers with him are considered to be false, he did not aim at the raft. It may be pitiable that he shot at all, but it should be borne in mind, as I have endeavored to point out, that the question which must be considered in the instant case is whether the laws of the United States, under which shooting in those circumstances is not unlawful, are so at variance with the laws of other members of the family of nations as to fall below ordinary standards of civilization.

In my opinion, the burden must devolve on any one making such a charge to show convincingly by comparison with the laws of other countries the iniquitous character of the laws of the country against which complaint is made. To my mind that cannot be shown by brief citations from domestic law such as are given in the opinion of the two other Commissioners. Nor do I perceive the relevancy of the citation of Article 46 of the Regulations Respecting the Laws and Customs of War on Land in the Fourth Hague Convention. An injunction against murder in territory under military occupation stated in five words can have no bearing to my mind on the propriety of domestic law dealing with the difficult subject of the use of force in connection with the repression of crime. This is particularly true in a situation such as that under consideration in which patrol officers were called upon under unusual circumstances to execute both military and civil laws. The sacredness of human life and the principle that it shall not be unnecessarily taken or endangered are recognized in the jurisprudence of the United States and are emphasized in the opinion of the Board of Review whose conclusions with respect to Gulley's action to my mind are not at variance with that principle. I have already indicated the view in which I understand the other two Commissioners concurred that obviously no denial of justice

can be predicated upon the action of the President of the United States in disapproving of the sentence of the court-martial.

FRED K. NIELSEN,
Commissioner.

TRIPARTITE CLAIMS COMMISSION *

(United States, Austria, and Hungary)

ADMINISTRATIVE DECISION NO. I

ANNOUNCING DEFINITIONS AND GENERAL GOVERNING PRINCIPLES AND DEALING WITH THE FUNCTIONS AND JURISDICTION OF THE COMMISSION

[May 25, 1927]

In addition to the Rules of Practice and Procedure [a] heretofore prescribed there are here set down for the guidance of the American Agent, the Austrian Agent, and the Hungarian Agent and their respective counsel definitions of terms and definitions of the functions and jurisdiction of the Commission, as well as general governing principles, which will, so far as applicable, control the preparation, presentation, and decision of cases submitted to the Commission.

Definition of terms

The following terms as used in the decisions and opinions of the Commission shall be taken to have the meaning indicated below:

United States: the United States of America and/or the Government of the United States of America;

Austro-Hungary: the former Austro-Hungarian Dual Monarchy and/or the Imperial and Royal Austro-Hungarian Government as it or they existed on August 1, 1914,[1] or on December 7, 1917;

Former Austrian Empire: the Austrian Empire as it existed on and prior to August 1, 1914;[1]

Former Kingdom of Hungary: the Kingdom of Hungary as it existed on and prior to August 1, 1914;[1]

* Established in pursuance of the agreement between the United States, Austria, and Hungary which became effective December 12, 1925. Edwin B. Parker, *Commissioner;* Robert W. Bonynge, *American Agent;* Ernst Prossinagg, *Austrian Agent;* Alexis de Boer, *Hungarian Agent.*

Lettered footnotes and references in brackets inserted by the Managing Editor of the JOURNAL.

[a] [Printed in Supplement to this JOURNAL, p. 119.]

[1] See Section 5 of the peace resolution approved by the President of the United States July 2, 1921, incorporated in the Treaties of Vienna and of Budapest, and paragraphs numbered (1) and (2) of Article I of the Tripartite Agreement.

[The Treaty of Vienna is printed in the Supplement to this JOURNAL, Vol. 16 (1922), p. 1; the Treaty of Budapest, *ibid.*, p. 13; and the Tripartite Agreement, *ibid.*, Vol. 20 (1926), p. 51.]

Austria: the Republic of Austria as now existing and as it existed on July 16, 1920, the date of the coming into effect of the Treaty of Saint-Germain-en-Laye, and on November 8, 1921, the date of the coming into effect of the Treaty of Vienna establishing friendly relations between the United States and Austria;

Hungary: the Kingdom of Hungary as now existing and as it existed on July 26, 1921, the date of the coming into effect of the Treaty of Trianon, and on December 17, 1921, the date of the coming into effect of the Treaty of Budapest establishing friendly relations between the United States and Hungary;

Allied Powers: the British Empire, France, Italy, Japan, Belgium, China, Cuba, Greece, Nicaragua, Panama, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Czecho-Slovakia, which with the United States were designated "Allied and Associated Powers" in the Treaties of St. Germain and Trianon, the United States being an "Associated Power" engaged with the Allied Powers in the prosecution of the war against the Imperial and Royal Austro-Hungarian Government;

Central Powers: those with which the principal Allied Powers were at war, namely, the Imperial German Government, the Imperial and Royal Austro-Hungarian Government, Bulgaria, and Turkey;

War period: the period between August 1, 1914,[1] and July 2, 1921, both inclusive, the latter date being the effective date of the joint resolution passed by the Congress of the United States declaring at an end the state of war between the United States and the Imperial and Royal Austro-Hungarian Government;

Period of American belligerency: the period between December 7, 1917, and July 2, 1921, both inclusive, the former being the effective date of the joint resolution passed by the Congress of the United States declaring the existence of a state of war between the United States and the Imperial and Royal Austro-Hungarian Government;

Period of American neutrality: the period between August 1, 1914,[1] and December 6, 1917, both inclusive;

American national: a person wheresoever domiciled owing permanent allegiance to the United States of America;

Treaty of Versailles: the treaty between the Allied Powers and Germany signed at Versailles on June 28, 1919, which came into effect on January 10, 1920;

Treaty of St. Germain: the treaty between the Allied Powers and Austria signed at Saint-Germain-en-Laye on September 10, 1919, which came into effect on July 16, 1920;

[1] See Section 5 of the peace resolution approved by the President of the United States July 2, 1921, incorporated in the Treaties of Vienna and of Budapest, and paragraphs numbered (1) and (2) of Article I of the Tripartite Agreement.

Treaty of Trianon: the treaty between the Allied Powers and Hungary signed at Trianon on June 4, 1920, which came into effect on July 26, 1921;

Treaty of Berlin: the treaty between the United States and Germany signed at Berlin on August 25, 1921, restoring the friendly relations existing between the two nations prior to the outbreak of war, which treaty came into effect on November 11, 1921;

Treaty of Vienna: the treaty between the United States and Austria signed at Vienna on August 24, 1921, establishing friendly relations between the two nations, which treaty came into effect on November 8, 1921;

Treaty of Budapest: the treaty between the United States and Hungary signed at Budapest on August 29, 1921, establishing friendly relations between the two nations, which treaty came into effect on December 17, 1921;

Tripartite Agreement: the tripartite agreement between the United States and Austria and Hungary signed at Washington on November 26, 1924, which became effective on December 12, 1925, under which the Tripartite Claims Commission is constituted;

Commission: the Tripartite Claims Commission constituted under and in pursuance of the tripartite agreement above defined;

Commissioner: the Commissioner selected by the United States, Austria, and Hungary to pass upon all claims of the United States and its nationals arising under the Treaty of Vienna and/or the Treaty of Budapest, including the three categories defined in Article I of the Tripartite Agreement;

Custodian Property: all property or the proceeds of the liquidation thereof now held by the Treasury of the United States or by the United States Alien Property Custodian or to which he is entitled under the provisions of the United States Trading with the Enemy Act of October 6, 1917, and amendments thereto, which at the time of his taking possession thereof or making demand therefor was the property of Austro-Hungary, the former Austrian Empire or its nationals, or the former Kingdom of Hungary or its nationals, or in which any of them had an interest;

Valorization: the conversion into American currency of Austro-Hungarian or other non-American currency at the pre-war cable transfer rate of exchange as provided in Sections III and IV of Part X of the Treaty of St. Germain carried into the Treaty of Vienna and of the Treaty of Trianon carried into the Treaty of Budapest.

All of the Allied Powers participated in drafting and became parties to both the Treaties of St. Germain and Trianon and the rights and advantages therein stipulated were, generally speaking, for the benefit of each and all of them. Consequently the language used in those treaties as applied to the United States on the one part and to Austria and/or Hungary on the other part, incorporated *in haec verba* as a part of the Treaties of Vienna and of Budapest respectively, is sometimes inapt and confusing. Throughout the opinions and decisions of this Commission the language thus incor-

porated will, for the sake of brevity and lucidity, be so paraphrased as to make it applicable only to the United States on the one part and Austria and/or Hungary on the other part.

To avoid possible confusion this and subsequent opinions will generally deal with the United States and its nationals on the one part and Austria and/or Hungary and their respective nationals on the other part as affected by the Treaties of Vienna and of Budapest respectively. Such provisions of the Treaties of St. Germain and Trianon incorporated respectively in these two treaties designated "Parts," "Sections," "Articles," "paragraphs," etc., as are referred to or quoted in these opinions in the main employ literally the same language, differing occasionally in the numbering. For convenience, citations to both treaties will be made, the first citation by number applying to the Treaty of Vienna and the second to the Treaty of Budapest, usually without designating the treaty cited.

Functions of Commission

This Commission was constituted and exists in pursuance of the terms of the Tripartite Agreement between the United States and Austria and Hungary which became effective on December 12, 1925. Therein are found the source of, and the limitations upon, the Commission's powers and jurisdiction in the discharge of its task of determining the amount to be paid by Austria and/or Hungary in satisfaction of their financial obligations to the United States and to American nationals falling within the terms of the Treaties of Vienna and/or Budapest respectively. Article I of the Tripartite Agreement provides that the Commissioner shall determine the amounts to be paid to the United States by Austria and by Hungary in satisfaction of claims embraced within the terms of the said treaties "including the following categories":

> (1) Claims of American citizens arising since July 31, 1914, in respect of damage to or seizure of their property, rights and interests, including any company or association in which they are interested, within the territories of either the former Austrian Empire or the former Kingdom of Hungary as they respectively existed on August 1, 1914;
>
> (2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to or death of persons, or with respect to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;
>
> (3) Debts owing to American citizens by the Austrian and/or the Hungarian Governments or by their nationals.

The financial obligations of Austria and/or Hungary which this Commission is empowered to determine arise out of claims presented by the United States falling within the several categories specified in the Tripartite Agreement and more particularly defined or described in the Treaties of

Vienna and of Budapest. American nationals who acquired rights under these treaties are without a remedy to enforce them save through the United States. As a part of the means of supplying that remedy this Commission was, by the Tripartite Agreement, created as the forum for determining the amount of the obligations of Austria and of Hungary. These treaties fix those obligations and prescribe what Austria and/or Hungary shall pay for. The Tripartite Agreement neither adds to nor subtracts from the rights or the obligations thus fixed but clothes this Commission with jurisdiction over all claims of the United States and its nationals based on the terms of the treaties and lays on the Commissioner the duty of applying those terms to the claims presented and of determining the amount, if any, due to the several claimants thereunder.

The Commission is not concerned with the enforcement of its awards or with the payment by Austria and/or Hungary of their financial obligations save as the terms of the treaties with respect to payment affect such obligations absolute or contingent, direct or indirect, and the amount thereof. The definitions of what Austria and/or Hungary shall pay *for* are found in the treaties. The *amount* which Austria and/or Hungary shall pay must be judicially determined by this Commission through the application of appropriate rules for ascertaining pecuniary obligations and for measuring damages to the fact of such claims of the United States and its nationals as fall within the terms of the treaties. But the problems of *how and when* the awards of this Commission shall be *enforced* and *how and when payment* shall be made or secured are political in their nature and must be settled by the appropriate political agencies of the governments concerned. The Commission's task is confined solely to construing the treaties and deciding what are the financial obligations of Austria and/or Hungary and their respective nationals arising thereunder and the amount thereof.

The liability of Austria and/or Hungary must be determined by the application of the terms of the treaty or treaties to the facts of each case. The treaties embody in their terms contracts by which Austria and Hungary accorded to the United States, as one of the conditions of peace, rights in behalf of American nationals which had no prior existence. While these doubtless include some obligations of Austria and/or Hungary arising from violation of rules of international law or otherwise and existing prior to and independent of the treaties, they also include obligations of Austria and/or Hungary which were created and fixed by their terms. All of these obligations, whatever their nature, are merged in and fixed by the treaties. The Commission's inquiry in this respect is confined solely to determining whether or not Austria and/or Hungary by the terms of the treaty or treaties assumed the pecuniary obligation asserted or accepted responsibility for the act causing the damage claimed, and it is not concerned with the quality of that act or whether it was legal or illegal as measured by rules of international law.

Consolidation of machinery set up under other treaties

The Treaties of St. Germain and Trianon (and similar treaties between the Allied Powers and the Central Powers) provided for:

(1) A Reparation Commission to determine the amount of reparation claims (and clothed with other powers of a political and administrative character not necessary here to notice);

(2) Clearing Offices mainly for the purpose of "clearing" and paying the debts of the nationals of opposing Powers and paying designated claims of Allied nationals;

(3) Mixed Arbitral Tribunals clothed with power to hear appeals from Clearing Office decisions, to hear and adjudicate all claims for compensation lodged against Austria and/or Hungary for damage or injury suffered by nationals of Allied Powers arising under paragraph (*e*) of Article 249 [232], and to hear and determine certain controversies between nationals of Allied Powers and nationals of Austria or Hungary arising out of contracts (paragraph (*b*) of Article 256 [239]); and

(4) An Arbitrator to determine the amounts of certain claims of Allied nationals and debts of Austria and its nationals and of Hungary and its nationals with which amounts so ascertained Austrian or Hungarian property seized as a war measure by an Allied Power may be charged (paragraph 4 of the Annex to Section IV of Part X).

Eliminating those provisions of the Treaties of St. Germain and of Trianon not adopted by the United States, the Tripartite Agreement in practical effect combines these several functions in one tribunal and the Commissioner is clothed with the power and it is made his duty to adjudicate reparation claims arising under Part VIII and compensation claims arising under paragraph (*e*) of Article 249 [232] and as Arbitrator[2] to assess the amount of claims and debts to the payment of which the Government of the United States may, at its election, apply the Custodian Property.

Jurisdiction

At the threshold of the consideration of each case is presented the question of jurisdiction, which obviously the Commissioner must determine preliminarily to fixing the amount, if any, of Austria's and/or Hungary's financial obligations. When the allegations in a memorial presented by the United States bring a claim within the terms of the Treaty of Vienna and/or the Treaty of Budapest and the Tripartite Agreement, the jurisdiction of the Commission attaches—otherwise the claim as presented will

[2] See paragraph 4 of the annex to Section IV of Part X of the treaties. The third category of Article I of the Tripartite Agreement confers jurisdiction on the Commission to pass upon "Debts owing to American citizens by the Austrian and/or the Hungarian Governments or by their nationals."

[The Treaty of St. Germain is printed in the Supplement to this JOURNAL, Vol. 14 (1920), pp. 1–183; and the Treaty of Trianon, *ibid.*, Vol. 15 (1921), pp. 1–151.]

be dismissed for want of jurisdiction. Should these allegations be controverted in whole or in part the issue or issues of fact thus made must be decided by the Commissioner, and if under such decision the claim does not fall within the terms of the treaty or treaties and the Tripartite Agreement it will be dismissed. But if the issue or issues of fact be so decided that the claim does fall within the terms of the treaty or treaties and the Tripartite Agreement, the Commissioner will apply such terms to the facts in the particular case and render judgment accordingly.

The claimant—Nationality of claims

All claims presented to this Commission shall be asserted and controlled by the United States as claimant either on its own behalf or on behalf of one or more of its nationals. With respect to espousing or not the claim of its national at the latter's request, and if espoused in determining when and how the claim will be presented and pressed or withdrawn or compromised, the United States will exercise an untrammeled discretion and the private owner will be bound by the action taken. While the nation's absolute right to control a private claim espoused by it is necessarily exclusive, because of the national interest that may be or become involved, nevertheless the private nature of such claim continues to inhere in it and the claim only in a very restricted sense becomes a national claim. The act of espousal does not vest in the nation the title to the claim. For the purpose of ascertaining the nationality of a claim as determined by its being impressed with the nationality of the private claimant, or for any other purpose pertinent to the proper exercise of its jurisdiction, the Commission will at any stage of a proceeding require a full disclosure of the private interest therein.

The nationality of claims as affecting the financial obligations of Austria and/or Hungary as well as the jurisdiction of this Commission will, so far as applicable, be determined by the principles and rules laid down by the present Commissioner as the Umpire of the Mixed Claims Commission, United States and Germany, in a decision rendered on October 31, 1924,[b] appearing at pages 175 to 194 inclusive of the printed Decisions and Opinions of that Commission. In so far as the effective date of the applicable treaty or treaties affects the nationality of a claim, the date mentioned in that decision (November 11, 1921, when the Treaty of Berlin became effective) will be substituted in the case of Austria by November 8, 1921, and in the case of Hungary by December 17, 1921, the effective dates of the Treaties of Vienna and of Budapest respectively.

Categories of claims

With a view to facilitating the preparation, presentation, and disposition of claims they are classified as follows:

[b] [Printed in this JOURNAL, Vol. 19 (1925), p. 612.]

I. *Reparation claims:* those arising under Part VIII, the reparation provisions of the treaties, including—

(a) Damage resulting from death of or injury to persons;

(b) Damage resulting from any kind of maltreatment of prisoners of war;

(c) Damage resulting from injury to or destruction of or taking of property.

II. *Economic claims:* those arising under Part X, the economic clauses of the treaties, including—

(a) Compensation for damage to or injury inflicted on property, rights, and interests by the application of war measures;

(b) Debts, including—

(1) those owing by Austrian [Hungarian] nationals including bank deposits and estate claims;

(2) State obligations;

(c) Public bonds, unmatured, and not subjected to war measures.

Reparation claims

Most of the claims of the United States or its nationals falling within the category of reparation claims grow out of damages resulting from death of or injury to persons or from injury to or destruction of or taking of property through physical force operating on physical property. With respect to such claims the principles and rules announced in the decisions and opinions of the Umpire of the Mixed Claims Commission, United States and Germany, will, so far as applicable, govern.

Apportionment of compensation in reparation claims and in claims for damages resulting from acts of Austro-Hungary

The Commissioner decides that the compensation for damages suffered by American nationals (1) falling within the reparation provisions of the treaties, or (2) resulting from acts of Austro-Hungary or its agents during the period of American neutrality, will be borne 63.6 per cent by Austria and 36.4 per cent by Hungary and awards made accordingly. The reasons for this decision follow.

Prior to the war the former Austrian Empire and the former Kingdom of Hungary were separate and distinct states. Each had its own governmental machinery, including a parliament. The citizenship of each was distinct from the other. Austro-Hungarian citizenship did not exist. An Austrian citizen could abandon his Austrian citizenship and acquire Hungarian citizenship and *vice versa*.

In 1867 a *de facto* and constitutional union with limited powers was formed whereby each of these states delegated to the Austro-Hungarian Dual Monarchy the power to act for them in the common administration of (1) foreign affairs, (2) the common army and navy (excluding the special army

of each state), and (3) matters of finance in so far as concerned joint expenditures for state purposes. This union was expressed in the common head who bore the title "Emperor of Austria and Apostolic King of Hungary." These joint expenditures were apportioned between the former Austrian Empire and the former Kingdom of Hungary by the Austro-Hungarian law of December 30, 1907 (B. L. I., No. 278), on the basis of 63.6 per cent to be borne by Austria and 36.4 per cent to be borne by Hungary. This was the basis upon which contributions were made by the former Austrian Empire and the former Kingdom of Hungary to the Imperial and Royal Austro-Hungarian Government enabling it to wage war against the United States.

The former Austrian Empire and the former Kingdom of Hungary while existing as independent states had no international status. It was against the Imperial and Royal Austro-Hungarian Government that the United States waged war (see resolutions of Congress effective December 7, 1917, and July 2, 1921). Following the armistice that government ceased to exist (see recitations in preambles to the Treaties of Vienna and of Budapest). In pursuance of the terms of the several treaties entered into between the opposing Powers after the armistice, not only was the Austro-Hungarian Dual Monarchy dismembered but substantial parts of the territories of the former Austrian Empire and of the former Kingdom of Hungary were ceded some to new and some to existing states. The Austria and the Hungary dealt with by the United States in entering into the Treaties of Vienna and of Budapest respectively not only bore little resemblance either to the government or the territory of the Dual Monarchy with which the United States had been at war but differed essentially from the former Austrian Empire and the former Kingdom of Hungary. Unlike the Treaty of Berlin "*restoring* friendly relations" between the United States and Germany, these treaties in terms "*establish*" for the first time such relations between Austria and the United States and between Hungary and the United States.

The questions here presented are, What existing government or governments are liable for the acts of the Austro-Hungarian Government or its agents resulting in damage to American nationals, is that liability joint or several, and what is its extent?

The answer must be found in the provisions of the Treaties of Vienna and of Budapest. It will not be profitable to examine the divergent views maintained by European continental writers on international law as compared with those of Great Britain and the United States with respect to the liability of a successor state for the obligations either *ex contractu* or *ex delicto* of a dismembered state. It is, however, interesting to note in passing that while one group maintains that such obligations pass with succession and are apportioned between the successor states, and while the other group maintains that the obligations do not pass with succession, neither group main-

tains that a *joint* liability rests upon two or more successor states where the territory of a dismembered state has been divided between them.

Under the financial clauses (Part IX of the treaties) elaborate provision is made for the apportionment between the successor states, including Austria and Hungary as they now exist, of the pre-war indebtedness, secured and unsecured, of the former Austro-Hungarian Monarchy, the former Austrian Empire, and the former Kingdom of Hungary, fixing sole responsibility on each successor state for the proportion of such indebtedness allocated to it.

All of the successor states other than Austria and Hungary are classed as "Allied or Associated Powers" and under the treaties it is entirely clear that none of them is held liable for any damages suffered by American nationals resulting from acts of the Austro-Hungarian Government or its agents during either the period of American neutrality or American belligerency.

By Article 178 [162] of the treaty Austria [Hungary] undertakes that she will make compensation for damage done, as defined in the annex thereto, to the civilian population of the United States and to their property by the aggression of Austro-Hungary and her allies. The language is the same in both treaties.[3] There is an undertaking by Austria to make compensation for specified damage and a separate undertaking by Hungary to make compensation for the same damage. Obviously it was not intended that double compensation should be made. Neither is there a joint undertaking.

Likewise in charging Custodian Property with the payment of neutrality claims identical provision is made in both treaties (paragraph 4 of the annex to Section IV of Part X) for the "payment of claims growing out of acts committed by the former Austro-Hungarian Government or by any Austrian [Hungarian] authorities since July 28, 1914, and before * * * [the United States] entered into the war."

Having in mind the pre-war and war relationship between the former Austrian Empire and the former Kingdom of Hungary and their respective responsibilities for the acts of the Austro-Hungarian Monarchy, the Tripartite Agreement under which this Commission is constituted was executed. It recites that all three of the parties are "desirous of determining the amounts to be paid by Austria and by Hungary" under the Treaties of Vienna and of Budapest respectively and provides that the Commissioner "shall determine the amounts to be paid to the United States by Austria and by Hungary." This language imports a distributive and not a joint liabil-

[3] This language follows like provisions in the Treaty of Versailles (Article 232 and Annex I) where Germany undertakes to make compensation for defined categories of damages including those inflicted by Germany's allies as well as by Germany herself. No claim has been pressed by the United States and no award made against Germany in any case of injury inflicted solely by the Government of Austro-Hungary or the former Austrian Empire or the former Kingdom of Hungary or their respective agents.

ity and a purpose to apportion damages for which both may be liable, allocating to each a definite amount. The notes exchanged between the United States and Austria during the negotiation of this agreement clearly reflect this purpose. This is in harmony with the spirit of the treaties considered as a whole which indicates a purpose not to create joint obligations as between Austria and Hungary as they now exist but to divide and to allocate to each its separate liabilities.[4]

The Reparation Commission, which under the Treaties of St. Germain and Trianon is clothed with the power to fix the amount of compensation to be paid by Austria and Hungary respectively under the reparation provisions of the treaties, has not as yet directly dealt with this question of apportionment as between them. That commission, however, acting within its jurisdiction has in a number of instances considered questions of credits on their reparation accounts to Austria and to Hungary respectively for warships, mine layers, abandoned war material, and other property formerly belonging to the Austro-Hungarian Government and passing under the treaties through the Reparation Commission or otherwise to the Allied and Associated Powers. The Reparation Commission in apportioning these credits as between Austria and Hungary accorded to Austria 63.6 per cent and to Hungary 36.4 per cent of the aggregate amount thereof, this being the basis on which the former Austrian Empire and the former Kingdom of Hungary respectively contributed to the acquisition of the ceded property by the Austro-Hungarian Government. It is believed that the rule applicable to the apportionment of credits to which Austria and Hungary are respectively entitled under the reparation provisions of the treaties is equally applicable to the apportionment of their liabilities thereunder. The Governments of Austria and of Hungary in the agreement of June 1, 1926, adopted as between themselves a division of liabilities in harmony with the rule here announced.

While this decision, in so far as applicable, will control the preparation, presentation, and decision of all claims submitted to the Commission falling within its scope, nevertheless should the American Agent, the Austrian Agent, and/or the Hungarian Agent be of the opinion that the peculiar facts of any case take it out of the rules here announced such facts with the differentiation believed to exist will be called to the attention of the Commissioner in the presentation of that case.

Done at Washington May 25, 1927.

EDWIN B. PARKER,
Commissioner.

[4] Wapa *v.* Republique d'Autriche, Austro-Yugoslavian Mixed Arbitral Tribunal, III Decisions of Mixed Arbitral Tribunals (hereinafter referred to as "Dec. M. A. T."), 720.

Administrative Decision No. II

DEALING WITH DEBTS AND CLAIMS ARISING UNDER THE ECONOMIC CLAUSES OF THE TREATIES[1]

[May 25, 1927]

There are pending before the Commission claims asserted by the American Agent on behalf of American nationals under the economic clauses incorporated in the Treaty of Vienna and/or the Treaty of Budapest based on—

(a) Debts owing by Austrian or Hungarian nationals to American nationals;

(b) Debts owing by the Government of Austria and/or the Government of Hungary to American nationals; and

(c) Claims for compensation in respect of damage or injury inflicted upon the property, rights, or interests, including debts, credits, accounts, and cash assets, of American nationals in the territory of the former Austrian Empire or the former Kingdom of Hungary by the application either of exceptional war measures or measures of transfer as those terms are employed in the treaties.

The Austrian and Hungarian Agents contend—

(1) That under the treaty Austria [Hungary] is not primarily and directly obligated to pay debts owing by Austrian [Hungarian] nationals to American nationals which have not been subjected by Austria [Hungary] in the territory of the former Austrian Empire [former Kingdom of Hungary] to the application either of exceptional war measures or measures of transfer as those terms are employed in the treaty;

(2) That with respect to debts owing in other than American currency by Austria [Hungary] or its nationals to American nationals the creditor is not entitled to the payment thereof in American currency at the pre-war rate of exchange;

(3) That with respect to debts owing by Austria [Hungary] or its nationals to American nationals the creditor is not entitled to the benefits of the provisions of paragraph 22 of the annex to Section III of Part X of the treaty with respect to interest; and

(4) That debts owing by Austria [Hungary] or its nationals to American nationals do not constitute a charge upon the Custodian Property.

The Commissioner sustains the first contention of the Austrian [Hungarian] Agent and holds that under the treaty Austria's [Hungary's] obligation

[1] Reference is here made to Administrative Decision No. I for the definition of terms used herein. The language of the Treaties of St. Germain and Trianon incorporated in the Treaties of Vienna and Budapest respectively is in this opinion frequently paraphrased so as to make it applicable only to the United States on the one part and Austria and/or Hungary on the other part. The term "Treaty" or "Treaties" as used herein means as concerns Austria the Treaty of Vienna and as concerns Hungary the Treaty of Budapest. Citations to both treaties will be made, the first citation by number applying to the Treaty of Vienna and the second to the Treaty of Budapest.

to pay debts (which have not been subjected to war measures) owing by Austrian [Hungarian] nationals to American nationals is contingent and indirect and not absolute, primary, and direct.

The Commissioner provisionally sustains the second and third contentions of the Austrian [Hungarian] Agent, but holds that in the event the Government of the United States, through its law-making power, should elect to adopt the method of payment or procedure provided for by paragraph (*h*) (2) of Article 249 [232] and paragraph 4 of the annex to Section IV of Part X of the treaty and apply the Custodian Property to the payment of the claims and debts defined therein, then under the terms of the treaty for the purposes of such payment the American creditors would be entitled to have their debts converted into American currency at the pre-war rate of exchange and also be entitled to the benefits of paragraph 22 of the annex to Section III of Part X of the treaty with respect to interest.

The Commissioner holds that under the treaty only the Government of the United States, acting through its law-making power, may determine whether or not the proceeds of the liquidation of the Custodian Property will be applied to the payment of such claims and of such debts as may be found by this Commission to have been owing by Austria [Hungary] or its nationals to American nationals.

The reasons upon which these conclusions rest [2] can be understood by a review of the pertinent economic clauses of the treaties and their application as between the United States and its nationals on the one part and Austria and/or Hungary and their respective nationals on the other part. Those clauses constitute Part X of the treaties. We are here concerned directly only with Section IV and incidentally with Section III thereof.

Section III—Clearing Offices

Section III provides a "method of payment" (first clause of paragraph 14 of the Annex to Section IV). This is in the form of Clearing Office machinery for the settlement of four defined classes (Article 248 [231]) of "pecuniary obligations" described as "enemy debts" (paragraph 2 of the Annex to Section III). Procedure is provided and reciprocal rules are prescribed for determining the relative rights and obligations of both groups of Powers when—but only when—this method of settlement is adopted.

[2] The precedents of the Mixed Claims Commission, United States and Germany, in dealing with debts, credits, and accounts, including cash assets, owing by Germany or its nationals to American nationals are of comparatively little value in solving the problems here presented because of the difference in practice between Germany on the one part and Austria and/or Hungary on the other part in the application of exceptional war measures to American property; and also because by agreement between the Government of Germany and the Government of the United States, Germany assumed primary liability with respect to all such claims and debts falling within the jurisdiction of that Commission, and by another agreement they fixed the basis for the valorization of all such claims and debts. No such agreements have been entered into between the Government of the United States on the one part and the Governments of Austria and/or Hungary on the other part.

The American delegates who participated in drafting the Versailles and similar treaties declined to commit the United States to this Clearing Office plan [3] and an alternate method of settlement or payment was provided embraced in paragraph (*h*) (2) of Article 249 [232] and paragraph 4 of the Annex to Section IV of Part X of the Treaty of St. Germain [Trianon], incorporated by reference in the Treaty of Vienna [Budapest],[4] which will be hereinafter noticed. Under that treaty the United States (but not Austria [Hungary]) had the right to elect, within one month from the coming into effect of that treaty, to adopt the provisions of Section III (consisting of Article 248 [231] and the annex of 25 numbered paragraphs embracing the Clearing Office plan) by giving notice to that effect.

The Treaties of Vienna and of Budapest came into effect on November 8, 1921, and December 17, 1921, respectively. The United States did not elect to adopt this "method of payment" provided through "the intervention of Clearing Offices" within one month thereafter and hence, under the express provisions of paragraph (*e*) of Articles 248 [231], the provisions of Section III do not apply as between Austria [Hungary] and the United States, save in so

[3] The American delegates insisted that the adoption of the Clearing Office plan should be made optional with each of the Allied and Associated Powers, because of the difference in the economic conditions with which each and its nationals had to deal in relation to the opposing Powers and their nationals. Most of the principal Allied Powers were plunged into war with practically no warning. Their nationals had little opportunity to withdraw funds from enemy territory or liquidate or adjust existing contracts with enemy nationals. Consequently some of them—notably Great Britain—in order to avoid general financial disaster to their nationals and through them to the nation, and to prevent as far as possible economic dislocation, guaranteed pre-war acceptances or carried bills of exchange and similar negotiable paper falling due after the declaration of war drawn on enemy nationals in the territory of the Central Powers. But the situation was quite different with respect to the United States and its nationals. The war between the principal Allied Powers and Austro-Hungary had been in progress for more than three years prior to the declaration of the existence of a state of war between the United States and Austro-Hungary, during which period American nationals had had ample opportunity in their discretion to withdraw their funds from Austrian and Hungarian territory and liquidate and adjust their contracts with Austrian and Hungarian nationals.

Had the United States adopted the Clearing Office plan it would have been required to complete the liquidation of all Custodian Property held by it and to account for the proceeds thereof through the Clearing Offices. These requirements ran counter to the express provisions of Section 12 of the American Trading with the Enemy Act which expressly reserved to Congress after the end of the war the right to determine the disposition to be made of seized enemy property. The Clearing Office plan contemplated the guaranty by both the United States and Austria [Hungary] of the payment of the private debts of their respective nationals and prohibited the voluntary settlement of debts between such nationals. It was believed that such a guaranty would have been repugnant to American conceptions of the functions of government and such interference with private contract rights in time of peace would have been repugnant to the spirit of American institutions.

[4] These provisions for the application by the United States of Austrian and/or Hungarian property and the proceeds of the liquidation thereof as an alternate method of payment are in harmony with the American Trading with the Enemy Act, leaving to the Congress the untrammeled right to dispose of such property and the proceeds thereof in its discretion.

far as they are read into Section IV by express provision or by necessary implication.

The purpose and scope of Section IV of Part X of the treaties.

This section in both treaties deals with state measures and the disposition of property subjected thereto. It is comprised of Articles 249 and 250 [232 and 233] and an annex consisting of 15 numbered paragraphs. The opening clause announces its purpose to be the laying down of principles for the settlement of questions of "private property, rights and interests in an enemy country;" that is, so far as concerns the problems here under consideration, the private property, rights, and interests of American nationals in the territory of the former Austrian Empire [former Kingdom of Hungary] *and also* the private property, rights, and interests of nationals of the former Austrian Empire [former Kingdom of Hungary] in the "territories, colonies, possessions and protectorates" of the United States.

The second clause of paragraph 14 of the annex to Section IV stipulates that "In the settlement of matters provided for in Article 249 [232]" between Austria [Hungary] and the United States "the provisions of Section III [which are copied in the margin [5]] respecting the currency in which payment

[5] Article 248 [231] (*d*) reads as follows:

"Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.

"For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Austria-Hungary.

"If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

"In the case of the new states of Poland and the Czecho-Slovak State the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII, unless they shall have been previously settled by agreement between the states interested."

Paragraph 22 of the Annex to Section III reads as follows:

"Subject to any special agreement to the contrary between the governments concerned debts shall carry interest in accordance with the following provisions:

"Interest shall not be payable on sums of money due by way of dividend, interest or other periodical payments which themselves represent interest on capital.

"The rate of interest shall be 5 per cent. per annum, except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

"Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

"Sums due by way of interest shall be treated as debts admitted by the Clearing Offices and shall be credited to the creditor Clearing Office in the same way as such debts."

is to be made and the rate of exchange and of interest shall apply."[6] Here is found the only express warrant for reading into Section IV any of the provisions of Section III as between non-clearing Powers and their nationals, and it will be noted (1) that this warrant is strictly limited to the carrying into effect of the provisions of Article 249 [232], or to the settlement and adjustment of rights, claims, obligations, or "matters" arising thereunder, and (2) that there are read into Section IV only such provisions of Section III as apply to or deal with currency and rates of exchange and interest. It is apparent, therefore, that those provisions of Section III under which Austria [Hungary] guarantees the debts of its nationals (paragraph (*b*) of Article 248 [231] and paragraph 4 of the annex to Section III) cannot be directly invoked to fix liability on Austria [Hungary] for the private debts owing to American nationals by Austrian [Hungarian] nationals.

Reading together the opening clause of Article 249 [232] and the second clause of paragraph 14 of the annex to Section IV,[6] it is apparent that the first simply indicates in a general way the subject-matter of the provisions following and the field of their application.[7] A general definition of the scope of the matters provided for does not in itself make provision for such matters. Neither do all of the indirect consequences flowing from the carrying into effect of the provisions of Article 249 [232] in themselves constitute "matters provided for" therein. In order to determine what matters the settlement of which is "provided for in Article 249 [232]" the provisions following the introductory clause must be examined.

Matters provided for in Article 249 [232].

The "matters provided for in Article 249 [232]," so far as pertinent to the problems here presented, are:

(1) Provision for the discontinuance by Austria [Hungary] of the application of exceptional war measures and measures of transfer to the property, rights, and interests of American nationals in Austrian [Hungarian] territory, and, where liquidation was not complete, the restoration of such property, rights, and interests to their owners (paragraph (*a*) of Article 249 [232]);

(2) Provision reserving to the United States the right to retain and

[6] This second clause reads as follows:

"In the settlement of matters provided for in Article 249 [232] between Austria [Hungary] and the Allied or Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present treaty notify Austria [Hungary] that one or more of the said provisions are not to be applied."

[7] Margaret Williams *v.* Berlinische Lebens-Versicherungs Gesellschaft, Anglo-German Mixed Arbitral Tribunal, V Dec. M. A. T. at page 325; National Bank of Egypt *v.* German Government and Bank für Handel und Industrie, *ibidem*, page 26.

liquidate in accordance with its laws all Custodian Property (paragraph (*b*) of Article 249 [232]);

(3) Provision for Austria [Hungary] making compensation to American nationals "in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in the territory of the former Austrian Empire [former Kingdom of Hungary], by the application either of the exceptional war measures or measures of transfer" as those terms are employed in the treaty (paragraph (*e*) of Article 249 [232]);

(4) Provision that the proceeds of the liquidation by Austria [Hungary] of American property, rights, and interests, including debts, credits, accounts, and cash assets, should be paid immediately by Austria [Hungary] to the American nationals entitled thereto or to the Government of the United States (paragraph (*h*) (2) of Article 249 [232]);

(5) Provision that the Custodian Property shall be subject to disposal by the United States "in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this article or paragraph 4 of the annex hereto" (paragraph (*h*) (2) of Article 249 [232]);

(6) Provision that the Custodian Property may be charged with the payment of (a) amounts due in respect of claims by American nationals against Austria [Hungary] "with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire [former Kingdom of Hungary]," (b) debts owing to American nationals by Austrian [Hungarian] nationals, and (c) claims growing out of acts committed by the former Austro-Hungarian Government or by any Austrian [Hungarian] authorities during the period of American neutrality (paragraph 4 of the annex to Section IV, which, by the language of paragraph (*h*) (2) of Article 249 [232] above quoted, is read into Article 249 [232] and is one of the "matters provided for" therein); and

(7) Provision that "Austria [Hungary] undertakes to compensate her nationals in respect of the sale or retention" of Custodian Property by the United States (paragraph (*j*) of Article 249 [232]).

In carrying into effect any of the foregoing provisions with respect to the rights of the United States or its nationals and making settlements and adjustments thereunder "the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest" will, so far as applicable, be taken into account (second clause of paragraph 14 of the annex to Section IV).

From this survey of the somewhat confused provisions of Sections III and IV of the economic clauses of the treaties, we come to determine their application to the several distinct questions raised by the Austrian [Hungarian] Agent involving (1) a definition of the term "debts" as found in Section IV; (2) *compensation* by Austria [Hungary] to American nationals for *damages* inflicted through the application of exceptional war measures or measures of

transfer to the property, rights, and interests (including debts, credits, accounts, and cash assets) of American nationals in the territory of the former Austrian Empire [former Kingdom of Hungary]; (3) the nature and extent of Austria's [Hungary's] *liability* for claims of, or debts owing to, American nationals not subjected to exceptional war measures; (4) when and on what basis debts or obligations contracted in Austro-Hungarian kronen or currency other than American, owing by Austria [Hungary] or its nationals to American nationals, shall be *valorized* and the rate and manner of computing interest thereon; (5) how the *amount* of such claims and debts shall be determined; and (6) the method of payment thereof.

Definition of debts

The Commissioner holds that the term "debts" as used in paragraph (*h*) (2) of Article 249 [232] of the treaty is a short term for "debts, credits and accounts" which in turn is included in the term "private property, rights and interests in an enemy country" (first clause of Section IV; see also first clause of paragraph 14 of the Annex to Section IV).

Only debts owing by Austria [Hungary] or its nationals residing in Austrian [Hungarian] territory (enemy country) to American nationals are here dealt with.[8] The provisions of Section III will be looked to as an aid in defining the very general term "debts." There are four classes of "pecuniary obligations" (first clause of Article 248 [231]) described as "enemy debts" (paragraph 2 of the annex to Section III) which are, by paraphrasing the language, defined thus:

(1) Debts payable before the war (December 7, 1917) and due by an Austrian [Hungarian] national residing [9] within Austrian [Hungarian] territory to an American national residing [9] within American territory;

[8] Debts owing to American nationals by nationals of the former Austrian Empire [former Kingdom of Hungary] who under the treaties became nationals of other states included in the designation "Allied and Associated Powers" are not here included. The nationals of such succession states are not "enemy debtors," the American creditors are not as to them "enemy creditors," and the debts owing by them are not "enemy debts" and are not included within the term "debts" as here used (paragraph 2 of the annex to Section III). Provision is made for the prompt return by Austria [Hungary] to the nationals of such succession states of their property, rights, and interests, including debts, credits, and accounts, situated in Austrian [Hungarian] territory (Article 266 [249]). Special provision was made for the settlement of debts between nationals of such succession states and Austrian [Hungarian] nationals (Article 271 [254] and paragraph (*d*) of Article 248 [231]). Provision was made by the Congress of the United States for the release and return of the property, rights, and interests, and the proceeds of the liquidation thereof, of the nationals of such succession states, which consequently are no longer charged with and cannot be applied to the payment of claims and debts of American nationals as provided in paragraph (*h*) (2) of Article 249 [232] (see subsection (*b*) of Section 9 of the Trading with the Enemy Act as amended by the Act of June 5, 1920, 41 Statutes at Large 978).

[9] The term "residing" as here used with respect to time as affecting debts means residing at any time falling within the period of American belligerency after the debt became due, *provided* all cash demand deposits will, for this purpose, be treated as due. The "period of

(2) Debts which became payable during the war (period of American belligerency) [9] to American nationals residing [9] within American territory which arose out of transactions or contracts with Austrian [Hungarian] nationals residing [9] within Austrian [Hungarian] territory of which the total or partial execution was suspended on account of the existence of a state of war;

(3) Interest which accrued due before and during the war to an American national in respect of securities issued or taken over by Austria [Hungary], provided that the payment of interest on such securities to Austrian [Hungarian] nationals or to neutrals was not suspended during the war; and

(4) Capital sums which became payable before and during the war to American nationals in respect of securities issued by Austria [Hungary], provided that the payment of such capital sums to Austrian [Hungarian] nationals or to neutrals was not suspended during the war.

Cash demand deposits, and time deposits expiring "during the war" as that term is defined in the treaties, including ordinary bank demand and time deposits, made or established by American nationals with Austrian [Hungarian] nationals prior to December 7, 1917, are included in the term "debts" as used herein without affirmative proof of a demand for payment by the American depositor, subject to the right of the Austrian [Hungarian] Agent to prove that the facts of any particular case take it out of the general rule here announced.

The foregoing definitions will be applied to the term "debts" wherever found without a qualifying word or phrase in the treaties or in this and subsequent opinions of the Commission.

The Commissioner rejects the contention of the Austrian and Hungarian Agents that because of the apparent limitation of the phrase "debts owing to them [American nationals] by Austrian [Hungarian] nationals," found in paragraph 4 of the annex to Section IV, the term "debts" as here used does not include the state debts described in the foregoing paragraphs (3) and (4). No such limitation is found in the applicable paragraph (*h*) (2) of Article

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American belligerency" is defined in Administrative Decision No. I as the period between December 7, 1917, and July 2, 1921, both inclusive, the former being the effective date of the joint resolution passed by the Congress of the United States declaring the existence of a state of war between the United States and the Imperial and Royal Austro-Hungarian Government and the latter being the effective date of the joint resolution passed by the Congress of the United States declaring such state of war at an end.

The terms "Austrian national" and "Hungarian national" as here used do not include nationals of the former Austrian [Hungarian] ceded territory who ceased to be Austrian [Hungarian] nationals upon the cession of such territory.

"Debts" as that term is used herein, or claims based thereon, are such as have been impressed with American nationality continuously during the period of American belligerency; *provided, however*, that if a debt or a claim based thereon became impressed with American nationality by the naturalization of the claimant or otherwise through operation of law after December 6, 1917, but before July 2, 1921, and remained to the latter date impressed with American nationality it will be separately dealt with by the Commissioner.

249 [232]. The construction which the Commissioner gives to the term "debts," as here used, to embrace state debts of Austria [Hungary] finds support in the decisions of the Mixed Arbitral Tribunals constituted under the several treaties and in the practice obtaining between the Allied Powers and the Central Powers.[10]

Liability for interest or capital sums due to American nationals in respect of securities issued or taken over by the former *Austro-Hungarian Government* will be dealt with in another decision.

Compensation for damages arising under Article 249 [232] (e)

Paragraph (*e*) of Article 249 [232] provides in substance that Austria [Hungary] shall compensate American nationals "in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in the territory of the former Austrian Empire [former Kingdom of Hungary], by the application either of the exceptional war measures or measures of transfer."

This provision constitutes one of the "matters provided for in Article 249 [232]," and hence in arriving at the measure of damages the provisions of Section III with respect to currency and rates of exchange and interest will be taken into account.

The phrase "property, rights and interests" includes "debts, credits and accounts" (first clause of paragraph 14 of the annex to Section IV).

Under the Tripartite Agreement the extent of the damage or injury, if any, inflicted upon an American national by the former Austrian Empire [former Kingdom of Hungary] through the application of war measures must be determined by the Commissioner.

In such determination the following principles and rules will apply:

(1) "Exceptional war measures" include those enumerated in the first clause of paragraph 3 of the annex to Section IV [11] and all others which were

[10] See agreement between the British and Hungarian Governments, ratifications of which were exchanged at London on April 20, 1922, copied in full in the supplement to Volume 17 (1923) American Journal of International Law, pages 46–48. Paragraph 5 of that agreement reads as follows: "To remove doubts the claims by British nationals with regard to their property, rights and interests with the payment of which all property, rights and interests of Hungarian nationals within British territory, and the net proceeds of the sale, liquidation or any other dealings therewith *may under paragraph 4 of the annex to Section IV of Part X of the treaty be charged* shall be deemed to include the classes of pecuniary obligations referred to in paragraphs (3) and (4) of Article 231 of the treaty."

Rubens *v.* Austrian Government, III Dec. M. A. T. 37; The Municipal Trust Co., Ltd., *v.* Hungarian Government, *ibidem*, 248. While these cases were appeals from Clearing Office decisions, nevertheless they throw some light on the question here considered.

See also Fourth Annual Report of the British Administrator of Austrian, Hungarian, and Bulgarian Property (1924), page 8, and the fourth paragraph of the agreement of July 24, 1924, between the British Government and the Austrian Government appearing on page 26 of that report.

[11] The language of paragraph 3 of the annex to Section IV follows:

"In Article 249 [232] and this annex the expression 'exceptional war measures' includes

in fact exceptional war measures whether or not expressly enumerated as such in the treaty or expressly provided for in any administrative, legislative, or judicial act or decree. It will be noted that the enumeration of exceptional war measures is very broad and sweeping and seems to include all measures taken by Austria [Hungary] or her authorized agents or by any person connected with the administration or supervision of enemy property. However, it is significant that this enumeration while inclusive is not exclusive, and all measures and acts of the general nature of those enumerated will be held to have been exceptional war measures.

(2) "Measures of transfer" include only those defined in the treaty provision copied in the margin, which definition is exclusive in its nature.

(3) In assessing the compensation to be paid by Austria [Hungary] for the damage or injury inflicted upon American nationals by the application of exceptional war measures or measures of transfer to their property, rights, or interests, the provisions of Section III with respect to currency and rates of exchange and interest will be taken into account.

(4) The Commissioner finds that the average cable transfer rate prevailing in the United States during the month immediately preceding the declaration of the existence of a state of war between the United States and Austro-Hungary (paragraph (*d*) of Article 248 [231]) was 9.36 cents American currency to one Austro-Hungarian krone. This is the rate which will be applied by this Commission whenever it is proper to apply the "pre-war rate of exchange."[12]

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measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

"Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation or devolution of ownership in enemy property, or the cancelling of titles or securities."

[12] The term "pre-war" applicable to the United States and its nationals as used in paragraph (*d*) of Article 248 [231] fixing the rate of exchange refers to a time prior to December 7, 1917, while the same term as applied to Great Britain, France, and other Allied Powers refers to a time prior to the entry (on July 28, 1914, or later) of each into war with the Central Power concerned in the particular treaty. During this period of American neutrality many of the debts which form the basis of claims before this Commission were incurred. Likewise during this period of more than three years the Austro-Hungarian krone as measured by the American exchange value depreciated to less than one-half of its par value. Consequently the treaty pre-war rate of exchange applicable to Great Britain, France, and some of the

(5) The Government of Austria and the Government of Hungary through their respective agents represent that Austro-Hungary, the former Austrian Empire, and the former Kingdom of Hungary did not issue, promulgate, or give effect to any exceptional war measures or measures of transfer applicable to American nationals; that they had no government agent or agency corresponding to the German *Treuhaender* or the Alien Property Custodian of the United States; that the decrees preventing their nationals from trading with enemies which applied to the nationals of Great Britain, France, Belgium, Italy, and other Allied Powers were never extended to or applied to American nationals or their property, rights, and interests, and that there were no Austro-Hungarian, Austrian, or Hungarian statutes, regulations, or decrees of any nature designed to prohibit, or which did in fact prohibit, Austrian or Hungarian nationals from communicating, trading, or having intercourse with American nationals during the period of belligerency, or designed to prevent, or which did in fact prevent, Austrian or Hungarian nationals from paying their debts owing to American creditors.

The burden will be upon the United States to prove the existence of Austro-Hungarian and/or Austrian [Hungarian] legislative, administrative, judicial or other general act or decree having general applicability to all the property, rights, and interests of American nationals in the territory of the former Austrian Empire [former Kingdom of Hungary]. In the absence of such proof the burden will be upon the United States in putting forward a particular claim on behalf of one of its nationals to prove that the property, rights, and interests of the claimant in the territory of the former Austrian Empire [former Kingdom of Hungary] were in fact subjected to measures in the nature of exceptional war measures or to measures of transfer taken by Austro-Hungary and/or by Austria [Hungary] resulting in damage or injury thereto.

Austria's and Hungary's liability for claims and debts

From the analysis of the portions of Sections III and IV of Part X of the treaty applicable to the United States and Austria [Hungary] and their respective nationals it appears that the only provisions fixing *direct* and *absolute* liability on Austria [Hungary] for *debts* owing by their nationals are those embodied in paragraphs (*e*) and (*h*) (2) of Article 249 [232], in the first of which Austria [Hungary] is held liable to make compensation for damage or injury resulting from its own acts in applying war measures to American property, rights, or interests, including debts, credits, accounts, and cash assets, and in the second of which Austria [Hungary] is required to pay to American nationals or the American Government the proceeds of the liquidation of American property, including debts.[13]

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other Allied Powers and their respective nationals is more than double the treaty rate applicable to the United States and its nationals.

[13] In carrying these provisions into effect the provisions of Section III respecting currency

An *indirect* liability is fixed on Austria [Hungary] for debts owing by its nationals (paragraph (*j*) of Article 249 [232]) *contingent, however*, on the Congress of the United States electing to retain and apply the Custodian Property to the payment of claims and/or debts in accordance with the provisions of paragraph (*h*) (2) of Article 249 [232] and paragraph 4 of the annex to Section IV.

Austria [Hungary] is, of course, independent of any treaty provisions, primarily liable for its public debts, evidenced by its bonds, treasury notes, and the like.

But nowhere in such of the clauses of the treaties as became effective with respect to the United States and its nationals is there found any provision fixing direct and primary liability on Austria [Hungary] for the debts of its nationals to American nationals in the absence of some act of the Austrian [Hungarian] Government operating upon such debts to the prejudice of the American creditors. The suggestion that, in the absence of such act by the Austrian [Hungarian] Government, it is obligated to pay American creditors for losses sutained by them due to depreciation during and after the war in the exchange value of Austro-Hungarian currency can be sustained only on the theory that Austria [Hungary] is liable for all of the direct and indirect, immediate and ultimate, consequences of the war. Clearly such a construction of the treaty is not justified (see reasons set forth in the "Opinion in War-Risk Insurance Premium Claims" rendered by the Umpire of the Mixed Claims Commission, United States and Germany,[a] Decisions and Opinions, pages 33 to 59 inclusive).

Valorization of debts—Interest

In the absence of a treaty so stipulating, there is no warrant for requiring the payment in American currency at the pre-war rate of exchange of Austrian [Hungarian] public debts or debts of Austrian [Hungarian] nationals owing to American nationals which by their terms are payable in Austro-Hungarian or other non-American currency. A contract obligation of the Austrian [Hungarian] Government or of an Austrian [Hungarian] national to pay Austro-Hungarian kronen is exclusively a krone obligation and is unaffected either by the purchasing power of the krone in Austria [Hungary] or by the exchange value of the krone as measured by other currencies.[14]

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and rates of exchange and interest must be taken into account in measuring the extent of the damage inflicted by Austria's [Hungary's] act or the amount which Austria [Hungary] is required to pay from the proceeds of liquidation of American property.

[a] [Printed in this JOURNAL, Vol. 18 (1924), p. 580.]

[14] This is the effect of the decision rendered by the Supreme Court of the United States on November 23, 1926, in the case of Die Deutsche Bank Filiale Nurnberg *v.* Charles Franklin Humphrey. Mr. Justice Holmes in delivering the opinion of the court said:

"An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. Legal Tender Cases, 12 Wall. 457, 548, 549. Obviously in fact a dollar or a mark may have

The Commissioner rejects the contention put forward by the American Agent that as paragraphs 4 and 14 of the annex to Section IV treat debts owing to American nationals by Austrian [Hungarian] nationals as within the provisions of that section, therefore the second clause of paragraph 14 requires the application of the provisions of Section III respecting currency and rates of exchange and interest to such debts. The Commissioner holds that the mere fact that such debts may fall within the scope of or be dealt with in Section IV does not under any and all circumstances require the application to such debts of the provisions of Section III with respect to currency and rates of exchange and interest. These provisions of Section III may be applied to debts only in carrying into effect such provisions of Section IV as deal with or operate upon debts. The clause invoked by the American Agent stipulates that "In the settlement of matters provided for in Article 249 [232] between Austria [Hungary]" and the United States the provisions of Section III respecting currency and rates of exchange and interest shall apply. Article 249 [232] makes no provision for the direct settlement of debts as between nationals of Austria [Hungary] and those of the United States or as between the Government of Austria [Hungary] and American nationals. Such debts (except those subjected to war measures) are not dealt with by Article 249 [232] save in those clauses providing in effect that the Government of the United States may charge or apply Custodian Property to their payment. Or, to state the proposition in another form, the provisions of Article 249 [232] do not deal with the settlement of debts as between private parties or as between American nationals and the Government of Austria [Hungary] but deal only with state measures taken by the United States (or by Austria [Hungary]) in respect of such debts. Should the United States elect to exercise the power of charging Custodian Property with or applying it to the payment of such debts in accordance with the

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different values at different times but to the law that establishes it it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off."

To the same effect is the decision of the Supreme Court of the United States rendered on May 16, 1927, in the case of Zimmermann et al. *v.* Sutherland et al. (Wiener Bank-Verein, of Vienna) brought by American nationals to enforce the application of funds seized during the war by the United States as the property of the Vienna bank to the payment at the pre-war rate of exchange of the pre-war bank deposit in kronen of the plaintiffs in the Vienna bank and payable there in accordance with the law of Austria. In denying the existence of the asserted right the court held: "The only primary obligation was that created by the law of Austria-Hungary and if by reason of an attachment of property or otherwise the courts of the United States also gave a remedy the only thing that they could do with justice was to enforce the obligation as it stood, not to substitute something else that seemed to them about fair." In disposing of the contention that this suit could be maintained under the Act of the Congress of the United States designated the "Trading with the Enemy Act" the court held: "That Act did not turn the Austrian into an American debt and impose a new and different obligation upon the Austrian Bank."

provisions of paragraph (*h*) (2) of Article 249 [232] and paragraph 4 of the annex to Section IV—one of the "matters provided for in Article 249 [232]" —then in the application by the Government of the United States as against the Government of Austria [Hungary] of these state measures to such debts the provisions of Section III with respect to currency and rates of exchange and interest will apply.[15]

The treaty terms place the ultimate responsibility on the United States through its law-making power [16] to elect to apply or not to apply the Custodian Property to the payment of claims and debts of American nationals as defined therein. When the facts shall have been fully developed by this Commission, the debts ascertained and the claims adjudicated, this election may be made advisedly. Pending such election the treaty provides that the Custodian Property shall be retained by the United States subject to the

[15] The reasoned opinions of the Mixed Arbitral Tribunals constituted under the Treaty of Versailles and similar treaties involving private debts between nationals of non-clearing states sustain the view here expressed. National Bank of Egypt *v.* German Government and Bank für Handel und Industrie, V Dec. M. A. T. 26; Margaret Williams *v.* Berlinische Lebens-Versicherungs Gesellschaft, *ibidem* 322.

See also Goldschmiedt *v.* Heesch Hinrichsen et Cie., IV Dec. M. A. T. 530; Loy and Markus *v.* German Government et al., V Dec. M. A. T. 551; Michalowski *v.* Deutsche Bank Berlin, *ibidem*, 463; Tempel *v.* Deutsch-Russische Transport (decided by German-Polish Mixed Arbitral Tribunal July 23, 1926); and Zundhutchen und Patronenfabrik Aktiengesellschaft *v.* Westbank Aktiengesellschaft, III Dec. M. A. T. 982.

The leading case apparently announcing a different rule, but without stating reasons therefor, is that of George Stevenson & Co., Ltd., *v.* Banque Nationale de Bulgarie, II Dec. M. A. T. 77. It was brought under the provisions of the Treaty of Neuilly by a British national against a Bulgarian national. While Great Britain had not adopted the Clearing Office system as a method of settlement of claims and debts between its nationals and Bulgarian nationals, it had by Order in Council, entered prior to the bringing of this suit, elected to adopt the alternate method of settlement and to apply the proceeds of Bulgarian property in its hands to the payment of debts owing by Bulgarian nationals to British nationals (see Fifth Annual Report of the Controller of the Clearing Office of Great Britain dated September 15, 1925, on page 13 under the caption "Department for the Administration of Bulgarian Property;" Armstrong's War and Treaty Legislation, 1914–1922, 2nd edition, page 313 *et seq.*). Having by this Order in Council—a state measure taken by Great Britain against Bulgaria—made such election, it necessarily followed that, under the express terms of the Treaty of Neuilly, the claims and debts owing to British nationals by Bulgaria and its nationals must be converted into British currency at the pre-war rate of exchange and that the interest provisions of Section III must be applied. Likewise Great Britain, having made this election, was required to apply the same provisions of Section III in accounting to Bulgaria for the property retained and liquidated. In the light of this analysis of what was really involved in that case, it is apparent that the disposition made of it is not in conflict with the rule here announced.

[16] Paragraph (*h*) (2) of Article 249 [232] provides that the Custodian Property "shall be subject to disposal by such Power [United States] in accordance with its laws and regulations." Section 5 of the [Knox-Porter] peace resolution adopted by the Congress of the United States and incorporated in the Treaty of Vienna [Budapest] provides that the Custodian Property "shall be retained by the United States of America and no disposition thereof made except as shall have been heretofore or specifically hereafter shall be provided by law," etc.

disposition of its law-making power until such time as Austria [Hungary] shall have made suitable provision for the satisfaction of all claims of American nationals against it. What those claims are must be determined by this Commission. What is suitable provision for their satisfaction must be determined by the law-making power of the United States. Should no other suitable provision be made by Austria [Hungary] for the satisfaction of American claims and debts, then the law-making power of the United States may at its election apply the proceeds of the liquidation of the Custodian Property to their payment in accordance with the provisions of paragraph (*h*) (2) of Article 249 [232] and paragraph 4 of the annex to Section IV of the treaty, these being "matters provided for in Article 249 [232]." In the event of such election—but only then—will the 'debts" not subjected to war measures owing to American creditors by Austrian [Hungarian] debtors and by the Austrian [Hungarian] State payable in non-American currency be converted and stated for the purpose of payment in American currency at the pre-war rate of exchange, and the interest provisions of paragraph 22 of the annex to Section III will apply. The amount so applied will be a credit to Austria [Hungary] which will in turn compensate its nationals in respect of such application of the proceeds of the liquidation of their property (paragraph (*j*) of Article 249 [232]).

Method of payment

As heretofore noted, Section III of Part X of the treaties, providing a "method of payment" of private debts and state obligations defined therein "through the intervention of Clearing Offices," was not adopted by the United States and hence has no application as between the United States and its nationals on the one hand and Austria [Hungary] and its nationals on the other hand.

But the provisions of paragraph (*h*) (2) of Article 249 [232] and of paragraph 4 of the annex to Section IV provide an alternate "method of payment" through the application by the Government of the United States of the Custodian Property to the payment of claims and debts of American nationals as defined therein. The Government of the United States by the terms of the treaties reserved and it is expressly clothed with the power at its election [17] to make such application of the Custodian Property; but such

[17] Paragraph (*h*) (2) of Article 249 [232] and paragraph 4 of the annex to Section IV. It will be noted that these clauses of the treaties providing for this alternate method of payment are so drawn as to harmonize with the provisions of the American "Trading with the Enemy Act" which reserved to the Congress of the United States the right to dispose of the Custodian Property and also with Section 4 of the peace resolution incorporated in the treaties which reserved to the United States all rights "to which it is entitled by virtue of any Act or Acts of Congress," including the Trading with the Enemy Act, and also with Section 5 of the peace resolution incorporated in the treaties which provides that the Custodian Property "shall be retained by the United States of America and no disposition thereof made except as shall have been heretofore or specifically hereafter shall be provided by law until such time"

election if made carries with it correlative burdens [18] and hence this alternate method of payment as well as the Clearing Office method is to some extent reciprocal.

Machinery for determining the amount of claims and debts

Eliminating those provisions of the treaties not adopted by the United States, the Tripartite Agreement in practical effect clothes the Commissioner with the power and it is made his duty to adjudicate all claims presented by the Government of the United States on its own behalf or on behalf of its nationals against Austria [Hungary] or its nationals falling within the terms of the treaties, including (1) reparation claims arising under Part VIII, and (2) compensation claims for damage or injury falling within the terms of paragraph (*e*) of Article 249 [232]; and, as Arbitrator appointed in pursuance of paragraph 4 of the annex to Section IV of Part X of the treaties, to ascertain and assess in the contract currency the amount of debts not subjected to war measures in order that an account may be stated as a basis for the interested governments taking measures looking to final settlement and that the law-making power of the United States may act advisedly in making final disposition of the Custodian Property.[19] In the discharge of the last-named function action by the Congress of the United States must be awaited before the Commissioner can take final action with respect to the conversion of foreign into American currency, determine the rate of exchange applicable thereto, and the application, if any, of the interest provisions of paragraph 22 of the annex to Section III of Part X of the Treaties.

Rules of procedure

The Commissioner prescribes the following rules governing debts and claims based on debts presented to the Commissioner by the United States on behalf of American nationals:

I. All such cases will be grouped by the Commissioner into two major

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as Austria and Hungary shall have respectively made suitable provision for the satisfaction of claims of American nationals against them.

[18] Should the United States elect to apply the Custodian Property to the payment of the claims and debts of American nationals it must to the extent of the amounts so applied credit Austria [Hungary] and the latter in turn is obligated to compensate its nationals in respect of the proceeds of the liquidation of their property so applied. Moreover, the United States to the extent it shall exercise the right reserved to it under paragraph (*b*) of Article 249 [232] to retain and liquidate Custodian Property—one of the "matters provided for in Article 249 [232]"—must, in the settlement of such liquidation, apply the provisions of Section III respecting currency and rates of exchange and interest. National Bank of Egypt *v.* German Government and Bank für Handel und Industrie, Anglo-German Mixed Arbitral Tribunal, V Dec. M. A. T. 26.

[19] See Administrative Decision No. I dealing with the functions and jurisdiction of the Commission. There is thus combined in one tribunal functions which under the Treaty of St. Germain [Trianon] and similar treaties between the Allied Powers and the Central Powers were allocated to the Reparation Commission, the Mixed Arbitral Tribunals, and an Arbitrator appointed in pursuance of paragraph 4 of the annex to Section IV of Part X.

classes designated class A and class B respectively. Class A shall comprise those debts (or claims based thereon) found by the Commissioner to have been subjected by Austria [Hungary] to exceptional war measures or measures of transfer. Class B shall comprise those debts (or claims based thereon) which the Commissioner shall find were not subjected to or affected by any Austrian [Hungarian] state measures. Class B shall be subdivided into class B (1) and class B (2). Class B (1) shall comprise debts (or claims based thereon) impressed with American nationality throughout the period of American belligerency. Class B (2) shall comprise debts (or claims based thereon) which became impressed with American nationality by the naturalization of the claimant or otherwise through operation of law after December 6, 1917, but before July 2, 1921, and which remained to the latter date impressed with American nationality.

II. A final judgment will be entered by the Commissioner in all class A cases for an amount stated in American currency compensating the American creditor for the damage or injury inflicted with interest thereon at the rate of five per cent per annum from the date of such infliction to the date of payment, such judgment to be in favor of the United States on behalf of the claimant against Austria [Hungary].

III. An interlocutory judgment will be entered by the Commissioner in all class B cases reciting (a) the name and residence of the creditor, (b) the name and residence of the debtor, (c) the date the debt was incurred, (d) the date of its maturity, (e) the principal amount thereof, (f) the rate of interest stipulated if any, and (g) the contract currency. The interlocutory judgment entered in all class B (2) cases shall also recite the date on which debts or claims based thereon became impressed with American nationality. Final judgment in all class B cases will be reserved by the Commissioner pending further notice to the respective agents.

IV. All claims based upon debts owing by Austrian [Hungarian] nationals to American nationals shall be asserted against the Government of Austria [Hungary] and the Austrian [Hungarian] private debtor jointly. Thereupon the Austrian [Hungarian] Agent shall cause notice of such claim to be given to the said Austrian [Hungarian] debtor and require such debtor to furnish the Austrian [Hungarian] Agent within 45 days from the date of such notice with all necessary information and data for the proper defence, if any, of such claim.

This practice, in pursuance of which final judgments stated in terms of American currency will be entered by the Commissioner in all cases save in class B cases as above defined, and interlocutory judgments will be entered in all class B cases, will enable the Governments of the United States, of Austria, and of Hungary to act advisedly in adopting measures for the ultimate payment of such judgments—measures political rather than juridical in their nature; and will enable the law-making power of the United States to act advisedly in making final disposition of the Custodian Property as con-

templated by Section 5 of the peace resolution constituting a part of the Treaties of Vienna and of Budapest.

This decision in so far as applicable will control the preparation, presentation, and decision of all claims based on debts owing to American nationals by Austrian [Hungarian] nationals or by Austria [Hungary] presented to the Commission and falling within its scope. In any case in which the American Agent, the Austrian Agent, and/or the Hungarian Agent is of the opinion that the peculiar facts of that case take it out of the rules here announced, such facts, with the differentiation believed to exist, will be called to the attention of the Commissioner in the presentation of that case.

Done at Washington, May 25, 1927.

EDWIN B. PARKER,
Commissioner.

BOOK REVIEWS[1]

Del Derecho de la Guerra y de la Paz. De Hugo Grocio. Madrid: Editorial Reus, S. A., 1925. Versión directa del original latino por Jaime Torrubiano Ripoll. Tomo I, pp. ii, 331; Tomo II, pp. 319; Tomo III, pp. 358; Tomo IV, pp. 341. Pesetas 30.

De Jure Belli ac Pacis Libri Tres. By Hugo Grotius. Volume II.[2] Parts I and II. Translation by Francis W. Kelsey, with the collaboration of Arthur E. R. Boak, Harry A. Sanders, Jesse S. Reeves, and Herbert F. Wright, and an introduction by James Brown Scott. Indices, and a list of editions and translations. Oxford, at the Clarendon Press: Humphrey Milford, 1925. pp. xlvi, 595. $7.50. (Part III in press.)

The first of these two new translations of Grotius, the Spanish one, was finished as early as 1921 and was actually published in 1925; the second, the American one, bears on its title page and under the translators' prefatory note the same year 1925, but its first part (Book I) was not published until May, 1927, its second part (Book II) not until quite recently, and its third part (Book III, and indices) is still expected. These translations constitute the twenty-ninth and thirtieth full translations of a book dated three centuries ago, and in this they bear their own message, to wit, that Grotius's work should not be considered as an antiquated book of the past, but as a living and still useful book of inspiring and forward-looking thought. The last full translation before these two, a German one, was published in 1869.

The aims of the two translations were different, and so were the plans on which their authors worked. Before this translation by Ripoll, no Spanish version existed. The explanation may partly have lain in the fact that from 1627 up to 1900 the great book was on the Roman *Index*. Ripoll's volumes, therefore, may well be said to lay the book open for the first time to some twenty Spanish-speaking nations, if they care to read it. He apparently has aimed at making a book for popular use, as the preface states it, and for quiet perusal, rather than for technical citation. He has confined himself to a version of the main text, basing it on the Amsterdam edition of 1735, which is in no wise characteristic, and leaving off both the numerous marginal references of the original and the numerous annotations added by Grotius, which, though only seldom extending what the text contains, frequently corroborate its statements. The work in this shape and in its four octavo volumes, without page-captions indicating book, chapter and paragraphs, may be less complete as a text-book, but it looks lighter and brighter than the Latin text does, and shows a more attractive appearance.

Kelsey and his assistants, on the other hand, intentionally did not omit

[1] The JOURNAL assumes no responsibility for the views expressed in book reviews or notes.—ED.

[2] Vol. I (Photographic reproduction of the 1646 edition) appeared in 1913.—ED.

one word from the edition of 1646, which embodied the last edition of the five prepared by the author himself (1625, 1631, 1632, 1642, 1646), and which for that reason was used likewise by Molhuysen for his text edition of 1919. Kelsey's three quarto volumes consequently will be heavier, the pages are fuller, but as a reference book his translation evidently is much more valuable. English translations have existed from the seventeenth century on; but, to say nothing of older ones, Whewell's (1853) was neither complete nor reliable, and Campbell's translation of 1814, which was reprinted at Washington in 1901 without mentioning its date, was decidedly poor. The only version deserving high praise and confidence was the French one published by Pradier-Fodéré in three volumes in 1867; but it was edited in a rather unattractive form, has been out of print for many years, does not supply the needs of the English-speaking part of the world, and is preceded by a preface not free from oversights and misstatements. Dr. Scott's introduction to the new American text surpasses Pradier's introduction by far.

The language of both translations would seem dignified, clear and easy; the English version much better revised and much sharper in its technical and other expressions. The work of the five American professors is such that a better translation cannot be expected. It must have been a heavy task to remould into modern language a text with so many shades of expression, now reading like the argument of a Roman jurist, now like the eloquence of a classical orator or poet. The American translators have been peculiarly happy in their translations of ancient poetry into English verses, doubtless mostly their own (the English *hexameter* on p. 37 seems unique). Ripoll rendered ancient poetry into prose.

It is regrettable that the Spanish text, which in its few Hebrew words is more or less accurate (except I, p. 273; Grotius II, 1, 12: 2), has practically all of its Greek words misprinted, several of them to the extent of being unrecognizable (see also the use of *leian* in Ripoll, IV, p. 40; Grotius III, 6, 20: 2), and that its Greek and Roman proper names teem with typographical errors. The American translation abstains from giving Hebrew words, and only three times prints a word in Greek characters (pp. 36, 101, 149). Ripoll has in a few cases by accident omitted a sentence (II, p. 233, III, p. 222, IV, p. 115; Grotius II, 13, 7, II, 24, 2: 1, and III, 11, 4: 4); Kelsey's translation seems to have only overlooked the word *tritum* in Grotius II, 8, 16 (p. 305), and on the six hundred pages of the text just one typographical error was discovered ("we" instead of "ye", on p. 143).

The translators have been right in not scorning improvements of mere outward form. Ripoll has made his text more restful by inserting asterisks between every two paragraphs (except II, pp. 231–319, and on a few scattered pages); simple though this method would seem, it renders the reader's mind a service similar to that of our present book paragraphs, in contradistinction to the old texts which went on without ever taking or allowing a breathing space. Kelsey in his version has had the very happy thought

to remove the captions of the different paragraphs of each chapter from the top of the chapter itself (as the original has it) to the tops of the several paragraphs; which really facilitates the understanding of the argument. It would have been still more clarifying if the words introducing a new topic, which the author regularly adds to his first subdivision instead of making them precede, could have been separated as a prefatory remark to the whole chapter or group of chapters to which they belong; but such a liberty with the text the translators rightly did not think permissible, though the Spanish text has in one instance had the boldness to do so (I, p. 69; Grotius I, 2, 1: 1) and though the English text ventures to make a similar change in the transition from II, 15, 9: 5 to II, 15, 9: 6 (Kelsey, p. 399). Kelsey divided the longer notes in paragraphs, which means an improvement.

The American translation is to have two indices: an index of authors cited, and a general index. A good general index will double or treble the helpfulness of the translation, and no doubt will be superior, for modern needs, to the antiquated index of the original; and an index of *auctores laudati* will prove to be a valuable contribution to a right understanding of Grotius's methods of work and of the character of his materials.

Translating Grotius requires an exceptional combination of knowledge in different fields, limpid though his Latin language is. Since he consistently alludes to facts from Biblical and classical history, and continually quotes from ancient authors (including the fathers of the Church), translators must be in a sense familiar with all of these fields. Evidently the five American university professors in this respect had many advantages over the Madrid professor working by himself; and they moreover availed themselves of the modern Leyden edition of the Latin text by Molhuysen, 1919, which Ripoll seems not to have consulted. Not only do they prove themselves to be thoroughly acquainted both with those numerous authors of old time who played so great a part in Grotius's life and book, and with ancient history, but they have located some quotations (pp. 23, 52, 122) and have even discovered a historical slip of Grotius's pen which so far had not been noted: "after" instead of "before" the third Punic War (II, 3, 15: 1, footnote; Kelsey, p. 216). In Ripoll's translation Rabshakeh becomes Ramses (III, p. 25; Grotius II, 18, 3: 2); Alcinous's queen Arete is changed into a man (II, p. 48; Grotius II, 5, 14: 2); the seventh book of Herodot becomes an author Herodato Polymnia (III, p. 211; Grotius II, 23, 7: 1); "*apud Euripidem Heraclidis*" is translated: "*en Eurípides de Heraclia*" (III, p. 31; Grotius II, 18, 4: 7); Alcibiades's son is made the author of an "*oración Isaeratea*" (II, p. 60, IV, p. 108; Grotius II, 5, 25, and III, 11, 1: 2, have: in an oration by Isocrates); Aristodemus is honored with the additional name of Cumis, Hannibal with that of Silio (III, pp. 312, 191; Grotius III, 2, 5: 2, and II, 22, 3: 2); generals are at times styled emperors (IV, pp. 34, 59; Grotius III, 6, 17: 3, and III, 7, 5: 1); "*los Holandeses*" are supposed to live in Tacitus's day (I, p. 299; Grotius II, 2, 13: 3); "*Brit-*

anni temporibus Taciti delectum obibant" is rendered by *"En los tiempos de Britano cumplían la leva de Tácito"* (IV, p. 194; Grotius III, 15, 12: 1); an interrogation-point is added after the names of the French brothers Du Puy, *fratres Puteani* (I, p. 219; Grotius I, 4, 5: 1). There are many, many more such errors in this translation. But he that masters all of the fields covered by Grotius's book, let him first cast a stone at this Spanish scholar, without whose strenuous labor the book would still be sealed with seven seals for the nations of his peninsula and of Latin America.

Heavier still are the requisites for an adequate juridical version of the text. It is not from any desire to carp at work of so meritorious a type that a few points will be indicated which might be deemed weak. The Spanish translator, being a professor of theology and canon matrimonial law, may at times have missed the technical meaning of an expression. He constantly renders *"civilis"* (*lex civilis*, etc.) by "civil" instead of by "municipal, domestic, national, of a state;" a translation especially inappropriate for explanations such as occur in Grotius I, 1, 14: 1; II, 2, 24; II, 20, 41; II, 22, 11; III, 6, 13 and 14; III, 7, 3: 1; III, 8, title; III, 9, 17 (Ripoll, I, pp. 59–60, 311; III, pp. 128, 196; IV, pp. 27, 38, 57, 93). Outsiders in a war are in some places styled *"neutrales"* (IV, pp. 76, 205; Grotius III, 9, 2: 2, and III, 17, title), a word avoided in the original, since outsiders need not or even may not be neutral; in another place they are called *pacíficos*, their country *tierra pacificada* (IV, p. 78, I, p. 296; Grotius III, 9, 4: 2, and II, 2, 10). The terms *brevi manu* and *condictio* have not been understood (IV, pp. 44, 176; Grotius III, 6, 22: 1, and III, 14, 6: 3). *Postliminium* in I, 1, 14: 1, and II, 15, 5: 2 is rendered by *el derecho de volver a su patria* or *el derecho a volver* (I, p. 60, II, p. 267). But even the American translation may at times slightly have failed, apart from the use of the term "international law" on p. 295, which is an oversight (our conception of international law being alien to the book). It sometimes adds a word which confines to individuals what in the original may apply both to individuals and to corporate bodies (*e.g.*, II, 5, 32; Kelsey, p. 259). Its authors would seem not sufficiently to have realized Grotius's habit of indicating states by styling them "republics and monarchies" (*e.g.*, Kelsey, pp. 9, 220, 429), a custom recurring in the first letters of the *Federalist*, especially in Jay's. This oversight has unfortunately caused a mistranslation of the very first paragraph of chapter I, where Grotius does not enumerate three, but only two sets of controversies, and where the words "those who have the same body of rights that kings have" merely indicate the republican colleagues of crowned monarchs (I, 1, 1; Kelsey, p. 33, as compared with the right interpretation given in Scott's Introduction, p. xxxvi). The English text is not always clear in those parts where the original distinguishes civil torts from crimes, the last two sentences of II, 21, 2: 4 on p. 524 being even unintelligible. It seems doubtful whether "curtailing of power" in I, 3, 9: 1 and "until he pays" in I, 3, 21: 1 is an adequate version (Kelsey, pp. 111, 146); whether "party of

higher rank" and "party of lower rank" (Kelsey, p. 396) correspond with Grotius II, 15, 7: 1; whether the beginning of II, 12, 25 and that of II, 20, 9: 2 have been well translated (Kelsey, pp. 359, 476), and whether "who is attacked" in II, 20, 40: 4 is right (Kelsey, p. 506). But imperfect versions of this type are exceedingly rare in the English text (they may be, moreover, open to different views) and are all of minor importance. It cannot be said too distinctly that this American translation is highly reliable, nearly perfect with respect to classical and juridical learning, and that consulting it must be illuminating even for those to whom Grotius's Latin is familiar. No armchair critic could ever intend to detract from the gratitude and praise which both translations deserve.

One difficulty is quite typical of this book: the difficulty raised by the word *bellum* itself. In always rendering *bellum* by "war" (*guerra*) and never by a broader term like "armed coercion," the two versions may at times have obscured or unjustly limited the meaning of the original; see *e.g.*, I, 4, 1: 1, II, 15, 5: 1, and II, 20, 40: 4 (Ripoll, I, p. 208, II, p. 267, III, p. 127; Kelsey, pp. 138, 393 and 506. On the other hand, the translators had to be consistent; the original only in exceptional cases uses a broader expression (*e.g.*, II, 20, 39: 4; Ripoll, III, p. 124; Kelsey, p. 504); "war" (*guerra*) is a familiar conception; "armed coercion" sounds pedantic and abstract; and in the majority of contexts the word "war" suffices entirely. Here lies a snare both ways.

It may be noted that "the King of Jora" mentioned in a quotation made by Dr. Scott (Kelsey, p. x) means the raja or sultan of Johore, on the Malay Peninsula. There is a bad custom among internationalists subsisting to this very day, the custom of quoting from authors one or two sentences without realizing in the least the juridical system of the author quoted; a custom which often is made worse by quoting authors on international law out of any chronological order. Applied to modern authors who have not always a well-rounded and thorough system and are often unoriginal—with the words "*alii post alios*" Grotius stigmatized such writers (III, 6, 8)—this habit is less important; but for such men as Gentili, Grotius, Van Bynkershoek, Vattel, Moser, it is much better not to quote them than to quote them in ignorance. These two new translations might contribute to make scholars and practical lawyers anxious to read Grotius before quoting from him.

Whoever becomes acquainted for the first time with *Don Quixote* or Shakespeare's *Sonnets* has no difficulty in understanding why these books have survived; why they are still outstanding; why they were and are considered masterpieces. It is quite so with the book now translated again. So far from being dry, lengthy, speculative, and monotonous, it is variegated, succulent, yet terse in its expression, overflowingly rich in fact and thought; no wonder that it retains the reader's attention. Let anyone who cares to make the experiment read Book I, Chapter 2 (Whether it is ever Lawful to Wage War), or Book II, Chapter 2 (Of those Things which belong to Men in

Common), or Book II, Chapter 16 (On Interpretation; can any caption look duller?), or the latter part of Book II, Chapter 20 (On Punishments; with Book II, Chapter 25, the zenith of the book), or—once the English text is completed—Book III, Chapter 11 (Moderation with respect to the Right of Killing in a Lawful War).

No doubt the arrangement and subdivision of the book of 1625 constantly reminds its readers that this is not a book written yesterday, and that they must not expect in it an argument either in favor of the League of Nations and the World Court or against these institutions; but at the same time the reader is fully aware how closely it deals with such solutions and problems as the world needs and discusses now. The American text should, according to the original plan, have been ready before the belligerent Powers were to go into their conference room; perhaps the present moment is a more opportune one for its publication. It is a precious gift to international law students all over the world; and a heartfelt homage of thankfulness, sympathy and respect may be paid to the memory of Professor Kelsey, who died in the very month in which copies of Part I of his translation arrived in the States. Among the many valuable contributions which the Carnegie Endowment has made to the study of international law and its progress, this last one, which in its form and printing is a treat for the eyes, is not the least; and the Kelsey group may feel rewarded for their arduous labor by realizing that for many years to come this will be considered a standard translation of a book which, so long as ideals of organizing the family of nations shall live, cannot cease to be read.

C. VAN VOLLENHOVEN.

International Rivalries in Manchuria 1689–1922. By Paul Hibbert Clyde. Ohio State University Studies. Columbus: Ohio State University Press, 1926. pp. xii, 217.

This is a study of diplomatic aspects. It touches only very lightly upon economic conditions and the ultimate objectives of the contestants. It deals with the whole of the Manchuria problem up to 1905, after which it concentrates largely upon South Manchuria.

Having mentioned the danger of partisanship and having started objectively, Dr. Clyde gives a very satisfactory account of Russian diplomatic activities, including an excellent treatment of the Li-Lobanoff Treaty; all goes well with regard to efforts relating especially to Manchuria, until, from the point at which attention is focused upon South Manchuria, his conscious effort to be non-partisan betrays him into doing what practically every other student of this subject has done, taking sides—the difference being that he presses unduly in defense of Japan where others have pressed too hard in indictment.

Throughout the latter half of the volume, the Open Door policy is made the subject of discussion. Throughout this discussion, Dr. Clyde

takes a literalistic, legalistic view. He is thoroughly indoctrinated with a well-known conception that the Open Door policy was laid down in and bounded by the specifying clauses in the John Hay circular notes of September–November, 1899. He apparently accepts, by referring to it without expression of query or dissent, the view expressed by several authorities in recent years that most-favored-nation treatment and the Open Door policy are substantially the same thing. It is a fact that both are directed toward making effective the principle of equality of opportunity; but, in the field of China policy, most-favored-nation treatment was a thing to be accorded *by China*, while the principle of the Open Door as enunciated by John Hay was that equality of opportunity should be accorded *by the foreign Powers*, in and with regard to their spheres of interest, to each other.

To show what the Hay notes were, Dr. Clyde quotes only Hay's instruction to Mr. Buck, American Minister to Tokyo, and a portion of the communication of Viscount Aoki, Japanese Minister of Foreign Affairs, replying to Mr. Buck, in 1899. These two exhibits do not indicate, as does the omitted paragraph of Aoki's note, that Buck had communicated to Aoki "the representations of the United States as presented in notes to Russia, Germany, and Great Britain." They give no adequate conception of what Hay had in mind, though they do show to what the Japanese Government subscribed, literally, in 1899. To understand what Hay's doctrine was, one must pour over Rockhill's memorandum to Hay, Hay's various notes, the exchanges between Choate and Salisbury, over Delcasse's reply, Bulow's reply, and later circular communications by Hay and replies made to them. From the 1899 Hay-to-Buck and Aoki-to-Buck notes, Dr. Clyde goes to Hay's circular note of January 13, 1905; he makes no mention of the circular memorandum of February 1, 1902, or communications in 1903. In the complete correspondence there is ample material to support the thesis that what Hay meant was: "To secure to . . . commerce and navigation . . . equality of treatment" within the spheres of interest, and, further, that the European Foreign Offices so understood it. (See especially Salisbury's replies to Choate.) As Dr. Clyde himself says: "The occasion for the 'Open Door' notes . . . in 1899 was the desire of the United States Government to insure to the commerce and industry of all nations perfect equality of treatment within the Chinese Empire and especially within the so-called 'spheres of influence or interest'" (121).

There is also ample evidence in the history of the period up to the Washington Conference to support the thesis that the Japanese Government did not understand the doctrine in this broad sense and that the Russian Government did not subscribe to it in that sense. This being the case, we find, as the study proceeds, confusion between, on the one hand, Hay's doctrine and, on the other, Japan's pledges. Dr. Clyde appears to overlook the distinction which should be made between doctrine, policy, plan and pledge (not to mention interpretation and construction). Thus, comes the statement:

"Such definition as it possessed was first given to the 'Open Door' doctrine by . . . John Hay, in 1899. . . . The 'Open Door' notes asked assurance from the Powers that within the said spheres of influence [Hay said 'interest'] they would not practice unfair discrimination in the matter of tariff rates, railway charges and harbor dues. . . . These requirements and these only constituted the 'Open Door' doctrine in 1899 and the scope of the policy remained unchanged until it was redefined at the Washington Conference" (pp. 187–8).

With regard to these three specified matters concerning which Hay asked for definite *pledges*, one may use to distinguish *pledges* from *doctrine* the language which Dr. Clyde himself uses to distinguish Hay's circularized declaration of July 3, 1900, from the equality of opportunity notes of the previous year: "This statement" [of 1900], Dr. Clyde says, "has," except for its association, "nothing to do with the 'Open Door' doctrine [a view from which the reviewer dissents]; rather was it a means through which the 'Open Door' might be maintained." Thus, of the pledges sought and given: it is reasonable to affirm that they were intended only as a "means through which" the principle of equality of opportunity might be shown respect; they were a part of the plan to make the doctrine effective. Pledges given may be something less—and in this case apparently were—than either doctrine, policy or plan.

This book contains a map which is a work of art but which contains a high percentage of errors and serves no useful purpose. There is a good bibliography, in which the omission of Moore's Digest of International Law is to be remarked. It is to be regretted that it has no index.

STANLEY K. HORNBECK.

Le Problème de Tanger. By Raphael Durand. Preface by Jacques Bainville. Paris: Recueil Sirey, 1926. pp. ix, 126. Map. Fr. 20.

This is an interesting and short book coming from the hands of one who evidently intends it to be an explanation, if not a plea, for the French in Tangier. It is logical and leaves the impression that the writer is thoroughly at home in the field about which he has chosen to speak. The thesis deals with the history of the whole problem of Tangier and brings it up to the date of July, 1925. There is in addition a review of the Organic Statute of 1923 and a consideration of its application.

The chief strength of M. Durand's work is that it is clear, logical, and concise. There are some weaknesses in it from the point of view of the average American scholar. First, it has the air of being an apology or a plea. Secondly, footnotes are usually in the form of explanations and do not reveal the sources from which the author gleaned his facts, nor the exact passages to which he refers. Thirdly, there is much digressive, if not irrelevant material inserted, which one has the feeling could have been omitted to considerable advantage. Thus the theory and history of sovereignty are

discussed in fourteen pages in order to state that the Sultan should be considered as sovereign over Tangier. Fourthly, the Spanish and English cases are not as clearly and ably treated as the French. Fifthly, there are some unnecessary repetitions of incidents due to the order of arrangement which might have been avoided.

But aside from its weaknesses and strength this book contains some rather interesting information. Italy is accused of trying to block the French plans in Morocco and Tangier. The United States is supposed to be carrying on a quiet campaign against France in the city. And England, led by the Francophobe Curzon, has forced France and Spain into agreeing to internationalization where they should have had complete possession.

The book, however, is informative and far from rabid. It is well worth the consideration of anyone interested in this particular field.

THORSTEN KALIJARVI.

The Origin of the Right of Fishery in Territorial Waters. By Percy Thomas Fenn. Cambridge: Harvard University Press, 1926. pp. xvi, 245.

Dr. Fenn has combed various legal sources bearing on his subject from the *Corpus Juris Attica* down to the dispute between Hugo Grotius and John Selden. He has performed his task with a thorough knowledge of Latin, keen insight into the significance of terms, reasonable accuracy, and with such exhaustive research that the ground will not need to be covered again. So far as the reviewer knows, no previous book has been published on this subject.

The Greeks had apparently no legal doctrine on the status of the sea. They sailed on it freely, and fish was for them an important article of food and commerce. The inference may be drawn that in practice the Greeks exercised a common use of the sea, that of fishing included.

Early Roman jurisprudence gives little space to the sea. Not until the second century of the Christian era did Marcianus proclaim that the sea, its shores and the fish therein are common to all men for their use. Celsus and Ulpian repeated this statement. The Romans measured the shore from the sea inland. High tide during storm and not low tide was the criterion. The shore was open by the *jus gentium* to all men. The codes of Theodosius and Justinian reveal no direct pronouncements on the common right of fishing. Justinian's Digest reiterated the law on the sea and on fishing as found in Marcianus, Celsus and Ulpian. The Glossators accepted the classical doctrine on the sea.

In the West, the emperors granted at first exclusive rights to fish in the rivers and then extended them to the sea as well. Otto IV confirmed in 1209 the Venetians in the possession of their property, including their fisheries in the Adriatic. The feudal law furnishes no mention of property rights in the sea. Baldus, died 1400, injected the theory of the adjacent sea. It meant not ownership, but jurisdiction; and the territorial extent was in no way

determined. Bartolus, died 1357, belonged to the class of jurists that made use the criterion of law. He left the impression that a state has jurisdiction not farther than one hundred miles from the coast. Gentilis was the first to apply the word *territorium* to the sea. Bodin proposed the extension of the sovereignty of the prince to sixty miles out to sea. The English presumed to control the fisheries in an enormous area of sea as being within the realm.

Against this English claim the Dutch argued for a freedom of fishery. Grotius divided the coastal waters from the high seas. The high seas should be free and open to the use of all men. He proposed that the adjacent or coastal sea should be confined to so much as could be protected by force from land. Ownership in this belt of sea he did not concede, nor did he define the extent of jurisdiction to be exercised therein. Dr. Fenn considers that with the argument of Grotius the origin of the right of fishery in territorial waters has been sufficiently traced.

CHARLES E. HILL.

The Dominions and Colonial Offices. By Sir George V. Fiddes, G. C. M. G., K. C. B., The Whitehall Series. London and New York: Putnam & Sons, 1926. pp. vi, 288. Index. 7s. 6d. net.

From the title of this book one would expect a treatise on the administration of the British Colonial Office which two years ago was divided into two offices, one dealing with Colonies and one dealing with the Dominions. But the author who was Permanent Under-Secretary of State for the Colonies, has undertaken the much more ambitious task not only of describing the administration of the Colonial Office but also the various units in the Empire. The personnel of the Colonial office has increased from 18 in 1874 to 220 in 1924, while the amount of business transacted has increased from 42,000 numbers in 1885 to 272,000 in 1924. The Office must not only follow every important question in the Colonies and Protectorates under its control but it must quench the thirst for information of members of Parliament who directed more than 500 questions to the Secretary of State in 1924. The author describes the subsidiary organizations which have come into existence alongside the Colonial Office—the Crown Agents which handle the purchasing of stores, the raising of loans and the construction of railways in the Colonies; the Colonial Audit Department; the Tropical Diseases Bureau; the Advisory Committee on Education and other bodies who occupy influential positions although they have only advisory power. He describes the severe control which the British Treasury exercises over the administration of colonies dependent upon Imperial financial aid.

Part II of the book gives a description of the crown colonies and protectorates; and in addition to administrative matters, it discusses the Indian question, particularly in East Africa; native problems in East Africa; and native policy on the West Coast. Less satisfactory is his treatment of the Dominions and of the Mandates. Final chapters, dealing with the Colonial and

Imperial Conferences, traverse well-known ground. This book does not pretend to be a profound study of the British Empire; and since the author has been an official, the book has reduced comment and ideas to a minimum. Nevertheless it contains a good deal of interesting information for the type of reader for which the Whitehall Series has been designed.

RAYMOND LESLIE BUELL.

Tabellen zum internationalen Recht. Herausgegeben von Justizrat Dr. Julius Magnus, Erstes Heft: Zivilprozessrecht. Zweites Heft: Staatsangehörigkeitsrecht. Berlin: Franz Vahlen, 1926. pp. xvi, 133; xvi, 133. 12 in. x 8½ in. Price, 12 Reichsmarks each.

This series is designed to furnish the legal profession with the needful material in the form of quotations, summaries and citations, on the various subjects of international legal interest treated separately by the several numbers of the *Tabellen*. This arrangement affords a conspectus which should be valuable both to practitioners and students of comparative law. The first number, on civil procedure, was prepared with the collaboration of Referendar Ottfried Mersmann-Soest, Professor Georg Kleinfeller of Kiel, Ministerialrat Ernst Lutterloh and Dr. Walther Uppenkamp of Berlin, and sets forth succinctly the relations of sixty-one countries with Germany in respect of the Hague Convention of 1905 and other kindred agreements and statutes on rights and privileges of aliens with regard to costs, security, actions *informa pauperis*, and execution of foreign judgments. An appendix carries the texts of all German treaty provisions on these subjects and regulations for their execution. The second number, on nationality, was prepared by Dr. Gustav Schwartz of Berlin assisted by Mr. Mersmann-Soest, and tabulates the law of thirty-five countries on acquisition and loss of nationality under twenty-five headings, thus greatly facilitating reference and comparision.

Dr. Magnus announces as in preparation numbers on: *Immaterialgüterrecht, Steuerrecht, Gesellschaftsrecht* (*Recht der Organisationsformen*), *Familien-und Erbrecht, Arbeitsrecht, Strafrecht*, and other subjects. He will also issue supplementary sheets for insertion in published numbers noting future changes in the law.

HENRY G. CROCKER.

Staatsangehörigkeit und feindlicher Character juristischer Personen. By Ernst Marburg. Berlin: Fr. Vahlen, 1927. pp. 115. Index. M. 6.

This monograph constitutes the seventh in the valuable series (*Völkerrechtliche Monographien*) published under the direction of Messrs. Schücking, Strupp and Wehberg. It deals with the much-disputed question of the nationality and enemy character of corporations in peace and in war. The author discusses the various theories of corporate nationality prevailing in the western world—domicil, principal place of business, state of incorpora-

tion, nationality of majority stockholders, etc., and the arguments to the effect that there is no such thing as corporate nationality. Before the war, national legislation—which the author surveys—concerned itself but little with these matters. During the war, they became of acute importance because of trading with the enemy acts and other restrictions on economic enterprise conducted by or on behalf of alien enemies. Here new tests were invented to determine corporate nationality and enemy character. The British courts began the new development by departing from the exclusive test of place of incorporation and espousing "control", although the author fails adequately to observe that formal political allegiance by incorporation and economic "allegiance" to the enemy states were used often in the alternative to deduce enemy character. Suits in court, sequestration and prize condemnations were the principal subjects involving these questions. In the peace treaties, the provisions for confiscation and liquidation of private property, actions for indemnity for enemy liquidations or war measures and to recover debts before the clearing offices again raised the issue of corporate nationality and corporate enemy character. The author presents an interesting critique of the more important decisions of the Mixed Arbitral Tribunals, many of which were conflicting and adopted different theories. This is one of the most original features of the monograph. In the United States, the author has not noticed such Supreme Court cases as those of the Swiss National Insurance Co., Behn, Meyer & Co., and others. In the literature he has apparently overlooked Feilchenfeld's valuable articles in the *Journal of Comparative Legislation* and other material in English. He discusses the post-war literature on the theories of corporate nationality, and is inclined to admit corporate nationality and to adopt the test of domicil or principal place of business. For war-time determination of enemy character, he approves the test of economic association with a particular country, as shown by "control". The monograph is a useful addition to the literature.

EDWIN M. BORCHARD.

El Congreso de Panamá y Algunos Otros Proyectos Unión Hispano-Americana. Edited, with an introduction, by Antonio de la Peña y Reyes (Archivo Histórico Diplomático Mexicano, No. 19). México: Secretaria de Relaciones Exteriores, 1926. pp. xxvii, 262.

Since the winning of their independence in the early nineteenth century the Latin American nations have attempted on various occasions, principally as the result of the fear of prospective European domination, to form an American confederation that would provide defense against Europe and guarantees for the maintenance of peace and the settlement of disputes by arbitration. It is the "principal object of the present volume," according to its editor, "to record the participation of Mexico in some of the projects of Latin American Union."

Mexico was one of the four nations participating in the Congress of Panama, and upon the adjournment of that congress on July 15, 1826, a suburb of Mexico City was designated as the place for its reconvening. Approximately three-fifths of this volume is devoted to documents setting forth Mexico's participation in the celebrated Congress of Panama.

Between the date of the failure of the Panama Congress to reconvene in Mexico and 1841, Mexico made three proposals for the calling of an international congress of American states but without success attending her efforts. The second section of this volume contains the proposal for a "General American Assembly initiated by Mexico" in 1831.

In 1857, while engaged in drafting a new Federal Constitution that was destined to provoke a bloody three-year civil war, Mexico merely acknowledged the receipt of a "Confidential Memorial Concerning the need of a Congress of Plenipotentiaries of the Various Hispanic-American States," that was presented by the Guatemalan Minister. This memorial and the brief Mexican acknowledgment of the same constitute the third section of this volume.

Civil war in the United States and joint European intervention in Mexico prompted the Peruvian Minister in Washington, who feared that the Confederacy might obtain European recognition and who felt that "the cause of the Federal Government [at Washington] is [was] in its final analysis, the cause of Spanish-America," to propose to Mexican Minister Romero in Washington on March 10, 1862, "that all the American nations adopt a uniform policy" in view of "the dangers that threaten them from Europe." The outcome was the project of a convention, drawn up by the Hispanic-American diplomats in Washington, which, among other things, fixed the conduct that was to be observed by the allied nations for combating revolutionary movements, "or, better said, the policy which they must pursue toward governments emanating from revolutions, to the end that these may disappear from our continent." The fourth section of this volume contains the documents which relate to this subject.

Acting upon the initiative of the Bolivian Minister in Paris, a group of Hispanic-American Ministers in that capital in 1886 drew up a statement setting forth "the desirability of assembling a Congress in Panama." The fifth section of the volume contains the statement of the Ministers and the brief note of the Mexican Minister for Foreign Affairs in which he promised to give the subject "careful attention."

The final section of this volume contains the correspondence that passed between the Ecuadorian Minister of Foreign Affairs and that of Mexico in 1895–1896 concerning a "Congress Proposed by the Government of Ecuador" for the purpose of codifying American public law; discussing means for promoting the industry and commerce of the continent; and of making arrangements for future periodic meetings of the congress.

As a compilation of state papers relating to important international mat-

ters, the value of this volume is obvious. The editor's "Introduction" is a comprehensive and well-written summary of the subject matter of the documents thereinafter published

CHARLES W. HACKETT.

The Law and Procedure of International Tribunals. By Jackson H. Ralston. Revised edition. Stanford University Press, 1926. pp. xl, 512. $5.00.

As a reference book Ralston's work, dating from 1910 (see this JOURNAL, Vol. V, 1911, pp. 534–538), has proved itself too helpful to need any more praise or recommendation. Any one who desires to consult the main international decisions on such or such a point begins by looking up Ralston; and will very often find there excellent provisional information. The author himself must realize better than any one else that his divisions and subdivisions have something arbitrary in them, and that several questions of law might have been classified under other headings; but the main thing is whether, by using the book in a sensible way, one easily finds what he desires to know, and the answer to that question is fully in the affirmative.

The scope of the book, the field it intends to cover, is not sufficiently clear. No doubt it purposes to submit a survey of (a) problems relating to the organization of international tribunals and claims commissions, and their competency (Chapters III, IV, V, VIII); and (b) problems relating to the adjective law before such tribunals and commissions, including rules of evidence (Chapters VI, VII). This is a well-defined area. The author apparently meant to add, from substantive law, the solutions given by awards to the general question as to what substantive law such tribunals and commissions should apply (Chapters I, II). The remaining chapters, however, would seem to represent merely a capricious handful of the numerous questions of substantive international law which have come before international benches in the past. If Ralston's book, which now mainly is based on American sources (the most complete and most important ones so far published), the opinions and decisions by the two Hague courts, and the Venezuelan awards, had been extended to an analysis of all international awards printed in scattered books and places, the material would have shown itself both to exceed by far the limits of one volume, and greatly to differ in character from the well related materials concerning organization, competency and adjective law of international tribunals.

Two difficulties are inherent in an undertaking of the type of this book. Interpretations given by tribunals on similar subjects often diverge because of the mere fact that they are rendered under treaties the provisions of which have a different wording; but the author would have made his book unreadable by incessantly referring to such particular treaty provisions, indispensable though this reference is. On the other hand—and this applies specifically to the mixed tribunals and commissions created under the several recent peace treaties—in many cases in which ordinary international tribu-

nals are left free to establish the law they deem applicable, these latter tribunals are bound merely to execute and interpret explicit treaty provisions. Their decisions on such points are doubtless worthy of note, but on a different footing from the ordinary interpretation of non-statutory international law by tribunals.

Internationalists not belonging to the Anglo-Saxon nations sometimes ask why judicial decisions are considered in international law practice of so much higher importance than scholarly statements made in books or in contributions to reviews. As against this author it is needless to emphasize the reasonableness of the distinction; he must find support in the fact that Professor George Grafton Wilson, in the new edition of his Handbook (1927), resolved to reduce the number of quotations from text-writers and to increase his references to awards and other source material. But this means that statements contained in "separate opinions" which have not been shared by the courts should either be passed in silence, or be mentioned on quite a different level from the authoritative opinions and binding decisions of the tribunals themselves (or of their umpires, as the case may be). It implies, moreover, the desirability of indicating how far there exists on each point of law a series of consistent awards following one trend and linking themselves up to each other so as to create an international jurisprudence, and how far, on the other hand, the international decisions quoted are rather fortuitous, written at haphazard, standing by themselves. For the sake of showing how an international jurisprudence develops, it would be an improvement over Anglo-Saxon methods if international cases were cited not only by their names, but also by the years in which they were decided.

Frequent consultation of Ralston's work has given the impression of its accuracy, carefulness, reliability. The first sentence on p. 259 (identic with one in the first edition) looks strange in a paragraph on "damages for torts," though the reader may find out what the author had in mind. On p. xxi, under the name of Descamps, the next century is prematurely quoted.

C. VAN VOLLENHOVEN.

Comparative Colonial Policy: With special references to American Colonial Policy. By V. Shiva Ram, Ph.D. (Harvard), Head of the Department of Political Science, Lucknow University. London and New York: Longmans Green & Co., Ltd., 1926. pp. xx, 297. Index.

This survey of the history of colonization, with an analysis of colonial policy, delivered in lecture form at Patna University in 1925, was written to supply a long-felt need for a comparative treatment of colonial policy and administration similar to the pioneer work of Professor Paul S. Reinsch of a quarter century earlier, to whom he acknowledges his largest debt. It presents in lucid and skillful manner a large mass of information. Of the first six chapters one is devoted to motives of colonization, one to the policies of

Portugal, Spain and Holland, one to the policies of France, and three to the expansion of the British Empire and the evolution of British colonial policy. Of the other six chapters, five are devoted to American policy (four to American policy and influence in the Philippines) and one to the League of Nations and the mandate system of trusteeship in the development of tropical regions whose control has been the goal of the industrial nations of the world. Although without footnote references, the volume has a detailed (but admittedly incomplete) bibliography of eight pages indicating the authors sources. The index is brief but satisfactory.

The author, a distinguished scholar of India who obtained his doctorate by diligent study at Harvard University, naturally views the motives and effect of the European imperializing process through the eyes of an intelligent native of a country subject to that process, and possibly sometimes fails to appreciate all the facts and the merits of the proceedings so succinctly presented, and he acknowledges that his researches have been restricted by absence of specialist libraries. He has evidently tried to avoid partisanship. His criticisms are usually sound and should prove helpful in stimulating a more intelligent appreciation of racial inheritance and improvements in imperialist relations.

Dr. Ram apparently is apprehensive of the danger of a possible world war between European and non-European races, a war which he hopes may be avoided by better adjustment of relations. The adjustment of relations between the "advanced and the so-called backward races"—between European and non-European races—he regards as the greatest problem of the twentieth century upon the successful solution of which by removal of causes of friction depends the permanent peace of the world. This, he states, is largely a problem of how to exploit or utilize the valuable tropical raw materials required for industrial progress of the temperate regions—how to utilize these valuable products for the good of all concerned without injury to the interests of the natives of the tropics and without the disadvantage of destroying native institutions and customs. He asserts that the adoption of the proposal of 1918 to assign to thickly populated India the mandate of the sparsely populated region of former German East Africa would have solved the population problem of India, which he calls the corner-stone of the British Empire, and advocates for India a partnership on equal terms in the Empire with the same kind of citizenship for all.

He treats with greater detail American experience in the rapid development of the Philippines under firm but liberal relations, the most interesting and important experiment in modern imperialism, which he regards as especially valuable as an illustration of the operation of the American basic principles of the "consent of the governed" and "self-determination" and has a far-reaching effect of reaction upon the policies of other great Powers holding adolescent or backward colonies in Asia, especially facilitating the adoption and expansion and improvement of the mandate principle first applied in

1906 for Morocco, in the Roosevelt-Root plan. Impressed with the advantages of the plan of representative Filipino commissioners elected by the Filipino legislature to sit in the American Congress he suggests the wisdom of adopting such representation for India in the House of Commons.

JAMES MORTON CALLAHAN.

Southern Albania in European Affairs, 1912–1923. By Edith Pierpont Stickney. Stanford University Press, 1926. pp. xii, 195. Index. $2.50.

In this small volume the author sits in judgment upon the merits of the cases of the various claimants to the territory which today constitutes the southern portion of the Albanian state. The author has carefully studied the propaganda and writings of the advocates on the different sides of the question and has largely disregarded the works of those who have attempted to write upon the subject from an unprejudiced standpoint. This method is probably not open to legitimate objection. The advocates of each side can be trusted to bring out all the facts supporting their view of the case, and the final judgment reached, under this method, must clearly be that of the author herself.

Reference is made to the fact that in Southern Albania the dividing lines of race and religion largely overlap and confuse each other; but the Albanians, at least, will feel that Miss Stickney was herself misled by this very confusion, when (p. 159) she writes that "the southwestern, or Argyrocastro district, was inhabited by a Greek majority." The Greek arguments throughout the whole controversy have been based on the theory that every member of the Greek Orthodox Church should be counted as a Greek.

The difficulties connected with the creation of the Albanian state are well set out, and also the dangers of the loss of their independence with which the Albanians were threatened during, and at the close of, the World War. It is shown that the fact that the independence of Albania has been preserved to the present time is due principally to the determined stand on this question taken by President Wilson at Versailles, the military successes of the Albanians themselves against the Italians in 1920, and the admission of Albania into the League of Nations. It was not until after this admission that the boundaries of Albania could be considered as settled. The book was written a little too soon for the author to consider the vital question as to how far all that Albania has gained has been jeopardized by her recent treaty with Italy.

The book is a worth-while contribution to the literature of an important, but little understood, question. The American Historical Association showed its appreciation of this historical study by awarding to it the George Louis Beer Prize in 1925.

The book closes with a nineteen page bibliography, to the value of which

the author has added by the insertion, after the titles of many of the works, of interesting one sentence comments.

ALBERT H. PUTNEY.

Éléments du Droit International Public Universel, Européen et Américain. By Karl Strupp. En collaboration pour l'édition française avec Joseph Blociszewski. Paris: Rousseau & Cie., 1927. pp. xvi, 432. Index.

In this French edition, the author has enlarged his German work published originally under the title, *Theorie und Praxis des Völkerrechts.* Professor Strupp is essentially a positivist and, contrary to most publicists in the field of international law, says very little of natural or ideal law, which, in his opinion, leads to misunderstanding of the law actually in force. The present work is, however, much wider in scope than his book published in 1926 under the title, *Grundzüge des positiven Völkerrechts,* already reviewed in this JOURNAL (Vol. 21, p. 215).

The author is a warm admirer of Alvarez, to whom he has dedicated the book, and who, in turn, has prepared its preface. The title was adopted in order to indicate a new method, as well as to present the thesis that only a small portion of public international law is universal in scope. The major portion of its rules are of particular or regional application, the countries grouping themselves for this purpose into Continental-European, Continental-American, Anglo-American, Latin, Scandinavian, etc., between which groups there are sometimes considerable differences leading to misunderstandings and conflicts (p. xv). The author does not maintain that the norms of public international law are not capable of universal application, nor, indeed, that the universal application of many of its principles is not desirable. But the principle applied by Alvarez to the American hemisphere is extended to other parts of the world by logical deduction. "Public international law is a law between states, not above them. The states being equal among themselves, public international law is a law of coördination and not of subordination. Important consequence: The states are only bound by norms which they have freely and voluntarily accepted" (p. 10). Thus it is that certain rules having been accepted only by Continental European states, are not binding upon states of the Anglo-American group or in the American Hemisphere. Not having been accepted by these other states, a failure to observe the rules cannot be deemed a violation (p. 11).

It is interesting to follow these principles in their application by the author. One of the examples of diversity between the groups applies to the notion of war itself. Before the Second Hague Conference, the Continental-European conception was that war was a relation between states, affecting individuals only as they became combatants, *i.e.*, active organs of the state. The Anglo-American rule is expressed by the author in the phrase: *inimici nostrae civitatis sunt inimici nostri.* The author traces the modification of both rules through the period of the World War and illustrates the progres-

sive widening of the definition of "alien enemy," for example in Great Britain, by means of a chart (p. 342). His conclusion is that the Anglo-American conception of war was never part of international law for the Continental states because it was never accepted by the latter group (p. 341).

The foregoing will perhaps sufficiently demonstrate the author's method. It is not within the limitations of this review to discuss his conclusions. The text presents in large outline what might be termed the actualities of his subject, giving both sides of controversial questions and making frequent use of diagrams and charts. He has also interspersed his discussions with references to contemporaneous authors and source-material. An entire division (pp. 233–327) is devoted to "Law preventive of war" before and since the World War, in which is treated the origin and activities of the League of Nations, the Permanent Court of International Justice, and other efforts toward world organization. It is obvious that the author has sought to emphasize the constructive side of present-day international law. He closes this part of his book with an analysis of the Locarno treaties, the spirit of which Alvarez describes in the preface as none other than "the American spirit transported to the old continent."

ARTHUR K. KUHN.

The State as a Party Litigant. By Robert Dorsey Watkins, Ph.D., Baltimore: The Johns Hopkins Press, 1927. No. 1, Series XLV, Johns Hopkins University Studies in Historical and Political Science. pp. xviii, 212. Index.

This short monograph, issued by the Board of University Studies of Johns Hopkins University, is an interesting and useful contribution to the discussion of a subject upon which there is comparatively little legal literature, especially in the United States, and which is likely to increase in importance as the activities of the state become more and more diversified with the increasing complexity of modern civilization.

The author begins his study with the conceptions of governmental immunity as found in the Roman law, and then takes up with greater elaboration the history of the doctrine in England. He reaches the reasonable conclusion that the King's exemption from suit in his own courts was purely personal and that the assumption of this exemption by the government exercising power in the name of the King was based upon a fundamental misconception of the nature of sovereignty.

The historical review of the modern developments of the doctrine of sovereign irresponsibility and the various forms of procedure adopted to mitigate it, by providing certain legal remedies against the government, such as the Petition of Right in England, and application to the Court of Claims in the United States, is thorough and scholarly. It includes a refreshingly independent study of many of the leading cases. The author evidently believes that even the decisions of courts of last resort do not necessarily con-

stitute either good law or immutable verity, and that what the courts actually do is more important than either the principles which they invoke or the theories which may be deduced from their opinions, and he shows some good grounds for these beliefs.

The review of the decisions is by no means exhaustive, but it furnishes an adequate conspectus of the general current of authority, and is brought as nearly down to date as possible by a brief but excellent analysis of the *Western Mais* case and its *sequelae*, and also of the cases dealing with the immunities in local courts of vessels owned or operated by a foreign government.

While the book deals primarily with the suability of a state by its own citizens in its own courts, the discussion of the extension to foreigners of such remedies as are afforded to citizens and of "The State before Foreign Courts" bring it within the field of international law. How far a state grants to foreigners an adequate remedy in its own courts for legitimate claims against it is always a question of international concern, and the legal responsibility of a state as such is one of the fundamental principles upon which international law is based.

The chapter dealing with "State Responsibility in France" is a valuable study in comparative, if not international, law and is particularly interesting in showing that a nation with a most highly centralized government may develop a greater sense of governmental obligation and a more effectual procedure for enforcing it than has been provided by American democracy.

A brief summary of the principles recognized and remedies provided both for citizens and for foreigners by the several States of the Union for the judicial ascertainment and enforcement of claims against them would have been useful, but this has not been attempted by the author and was doubtless regarded by him as not within the scope of his work.

The author's conclusion, that the broad doctrine of sovereign immunity is obsolescent, is convincingly expounded. His views on this subject, his criticism of the illusory distinction between tort and contract as affecting the jurisdiction of the Court of Claims, and his analysis of the result of the decision in O'Reilly de Camara *v.* Brooke, 209 U. S. 45, are closely in accord with those expressed in an article published in this JOURNAL in April, 1910, under the title of "The 'Act of State' Doctrine," by the writer of this review.

HOWARD THAYER KINGSBURY.

Die Völkerbundsatzung gemeinverständlich erläutert. By Dr. Hans Wehberg. Berlin: Hensel & Co., 1926. pp. 146. Index.

Popular interest in Germany in the significance of the League of Nations increased notably after the Locarno treaties, when it became evident that the adherence of the Reich could not be much longer delayed. Dr. Wehberg has prepared this little book for average lay readers in Germany. He explains

that his work on the League, published in collaboration with Professor Schücking in 1921, and later in 1924, was purely scientific in character and took for granted a considerable technical knowledge on the part of the reader. The present work is a compact and practical little handbook giving the text of the Covenant in German, article by article, with commentaries. The author's comments are by no means limited to the legal analysis and interpretation of the articles of the Covenant. His purpose is also to explain in popular style the effect of the Covenant upon Germany's diplomatic relations and upon the maintenance of peace in general. This is not an easy task to fulfil within a narrow compass. Under Article 16, for example, he endeavors to explain how Germany came to sign the treaty with Soviet Russia on April 24, 1926, when it had already applied for admission to the League. Under that treaty, each of the parties agrees to remain neutral, if the other party becomes the object of aggression by a third state. The author properly remarks that the Covenant would never require action against an innocent state. However, under Article 3 of the Soviet treaty, each of the parties agrees to refrain from joining an economic or financial boycott against the other, but the author has not explained the seeming conflict with possible obligations under the Covenant. The author deems it sufficient to say that the League can carry out its true purpose only if it seeks to maintain the friendliest relations possible with Soviet Russia and that the ideal of German policy, rightly conceived, should aid in the maintenance of such relations. (p. 95).

ARTHUR K. KUHN.

BOOK NOTES

The first number of a new German quarterly devoted to the law of aerial navigation and related branches of law, the *Zeitschrift für das Gesamte Luftrecht*, has made its appearance. It is edited by Professor Doctor Otto Schreiber, of the University of Königsberg, and is published by Walter de Gruyter and Co., of Berlin and Leipzig. At present there are only two other journals in this field, the *Revue Juridique internationale de la Locomotion Aérienne*, published in French, and the *Diritto Aeronautico*, published in Italian. While, we are told, the language of the new *Zeitschrift*, will be German, articles written by French, English, Italian and Spanish authors will be published in the language in which they are written. The first number contains 125 pages of signed articles, reviews, texts of judicial decisions, statutes and other documents, in their original languages. Among the more noteworthy articles may be mentioned one by Professor Pereterski, of the University of Moscow, on the "Development of Aerial Law in the Russian Soviet Union," one by Dr. Pittard, of Geneva, entitled *Dominium Coeli*, one by Mr. J. K. Rooker entitled "An International Code of Civil Law and the International Chamber of Commerce," and one by the editor,

Dr. Schreiber, dealing with a proposed international convention relative to the security of operations in international air transportation.

The first number of the *Zeitschrift* sets a high standard both as regards the character of its articles and its form, and it will be welcomed as an indispensable addition to the periodical literature devoted to a new and increasingly important branch of international law. J. W. G.

Die Satzung des Völkerbundes. Mit Einleitung und Erläuterungen. By Dr. Frhrn. von Freytagh-Loringhoven. Berlin: George Stilke, 1926. pp. xxiv, 379. Index. 8 Reichsmarks.

The author, a member of the Reichstag, discusses the Covenant of the League in the light of political conditions. Indeed he maintains that the principles of the Covenant have not the binding character of rules of civil law, but must be interpreted always in the light of political conditions (vi). With this elastic viewpoint, the author leads us through a review of the practical workings of the League. In the main, his opinion of the League is unfavorable. The author believes that the incorporation of the Covenant into the Treaty of Versailles has made the purposes of the League impossible of accomplishment; and that unless the League divorces itself from the peace treaties, it will continue only until there is formed a constellation of the Powers which does not represent a continuation of the Entente (p. 24). Much of the later discussion may be easily understood in the light of this Cassandra prophecy.

The last hundred pages of the book contain, among other documents, the English and French official texts of the Covenant, the regulations of the Council and of the Assembly, the Statute of the Permanent Court, the provisions of the Polish Minorities Treaty, the Geneva Protocol of 1924 and the Locarno Treaties. A. K. K.

Relaciones entre Mexico y Venezuela, by Manuel Landaeta Rosales, a pamphlet of sixteen pages, is number twenty-one of a series relating to Mexican Diplomatic Historical Archives. It contains a résumé of historical data showing the common influence of Mexico and Venezuela on one another from 1531 until about 1919, largely through the activities of individuals, international congresses, laws and trade.

Grotius Annuaire International pour l'année 1926 (La Haye: Martinus Nijhoff, 1926. pp. viii, 392. Cloth, 15 guilders.) The leading contents of this annuaire are an appreciation of the international services of the late A. F. de Savornin Lohman, an article on the International Chamber of Commerce and its Dutch national committee, and an account of the commemoration of Grotius' *De Jure Belli ac Pacis* in Holland and foreign countries (which omits mention of the series of articles published on Grotius in this JOURNAL in 1925). It also contains a summary of international legal events (which includes the text of the treaty of April 3, 1925 between Belgium and the

Netherlands revising the Treaty of 1839 with annexed interpretative documents), a summary of Dutch jurisprudence in matters of private international law, detailed accounts of Holland's activities as a member of the League of Nations and of the International Labor Organization, articles on the Academy of International Law and the Library of the Peace Palace at The Hague, texts and extracts from prize decisions concerning Dutch ships and cargoes, a résumé of the work of the Permanent Court of International Justice in 1925, a list of members of the Permanent Court of Arbitration and a table of cases decided 1902–1922, notes on arbitral sentences rendered by Hollanders, and lists of Dutch members of international commissions and mixed and arbitral tribunals, of Dutch delegates to international conferences in 1925, of Dutch organizations of international law and international relations, a bibliography of publications on international law and related subjects published in the Netherlands in 1925, and ending with a summary of the preceding annuaires, of which eleven have been published.

International Law Documents. Regulation of Maritime Warfare. Naval War College, 1925. (Washington: Government Printing Office, 1926. pp. x, 207. Index. 80¢.) This is a topical arrangement of a collection of typical regulations relating to the conduct of maritime warfare issued during the World War, including some of the earlier formulations, such as the Declaration of Paris, the Hague conventions and declarations, the Declaration of London, and the resolutions of the Institute of International Law. The national regulations are selected from those of Great Britain, China, France, Germany, Italy, Japan, Norway, Portugal, Russia, Spain, Sweden, and the United States.

World War Debt Settlements. (By Harold G. Moulton and Leo Pasvolsky, with the aid of the Council and staff of the Institute of Economics. New York: The Macmillan Co., 1926. pp. xiii, 448. Index. $2.00.) This book deals with the inter-Allied and reparation debts of the governments involved in the World War and the series of settlements negotiated by them between 1921 and 1926. Its purposes are to present the salient facts as to the amount and origin of each of the debts, to describe the nature of the various settlements that have been negotiated, to indicate the changes in national policies that have occurred, and to outline the issues that are still in suspense. The texts of the reparation documents, the United States debt settlements, and the British debt settlements are printed in appendices.

International Problems and Relations. (Proceedings of the Academy of Political Science in the City of New York, July, 1926 (Vol. XII, No. 1). pp. xxvii, 500. Index.) These proceedings consist of a series of addresses and papers presented at the National Conference on International Problems and Relations, held under the auspices of the Carnegie Endowment for International Peace with the coöperation of the Academy of Political Science, at

Briarcliff Lodge, New York, May 10–14, 1926. There were five general sessions of the conference and nine round table conferences, and the proceedings are divided into nine parts dealing, respectively, with Disarmament and security, Raw materials in relation to international peace and economic prosperity, The Far East, The Danubian and Balkan States, Economic adjustments and the French debt, International problems of Latin-America, International coöperation for the promotion of public health and social welfare, Special topics, and America's part in international coöperation. Some fifty leading publicists and specialists from the United States, Great Britain, France, Switzerland, Germany, Denmark, Austria, Czechoslovakia and Bulgaria, spoke on over sixty topics under the general subjects into which the program was divided. The aim of the conference was "to create and diffuse in America a wider knowledge of the facts and a broader and more sympathetic interest in international problems and international relations." Invitations were accordingly extended to representative groups of American and foreign editors and journalists to be the guests of the conference and to participate in the discussions, and a considerable number accepted the invitation. The volume is a repository of valuable information and constitutes a convenient handbook to anyone interested in or working upon the problems discussed.

Proceedings of the First Annual Conference on Foreign Affairs and American Diplomacy, Louisiana State University, February 3, 4, 5, 1927. (Baton Rouge: University Bulletin, March, 1927, Vol. XIX—N. S., No. 3. pp. 180.) This is the report of the first of what is hoped to be a series of annual conferences having for their purpose to diffuse information and guide in the development of an intelligent public opinion with regard to foreign affairs and American diplomacy in the Southwest. The conference consisted of seven round table discussions, two evening sessions, and a travel luncheon. At the round tables were discussed Present day relations between the United States and Latin American nations, The politics of France and England since 1918 with reference to foreign policy, Financial and economic rehabilitation of Europe since 1918, The Church and the problem of world peace, Women and the problem of peace, Administrative problems of American foreign policy, and The present status of international law. College, university and high school teachers of the Southwest, clubwomen, editors, business men, preachers and interested citizens participated in the discussions. Professor Amos S. Hershey, of Indiana University, was specially invited to preside at the round table discussion on international law.

The British Year Book of International Law, 1926. (London: Humphrey Milford, 1927. pp. vi, 291. Index.) The leading article treats of the unsolved question raised by the Senate reservation to American adherence to the Statute of the Permanent Court of International Justice, and Dr. Arnold D. McNair, the author, concludes that "The Council must be absolutely unani-

mous in requesting the Court for an advisory opinion, except when the opinion is not 'substantially equivalent to deciding the dispute between the parties,' but merely relates to the procedure or method to be adopted by the Council in settling the dispute." (p. 13). Professor J. L. Brierly, in an article entitled "The Draft Code of American International Law," expresses an unfavorable opinion of the projects of public international law drafted by the American Institute of International Law. Under the title "Sovereignty, Seisin, and the League," Sir John Fischer Williams criticizes certain legal views expressed by the Commission of Three appointed by the Council of the League to report on the Mosul question which seemed to deny the doctrine of legal title acquired by war and conquest. Professor A. Pearce Higgins discusses "Visit, Search, and Detention," under the conditions of modern warfare, and suggests a system of certificates from representatives of belligerents in neutral ports for the protection of neutral trade in preference to the certification of neutral governments as has been sometimes recently proposed. Other articles are "International Administration," by C. Delisle Burns; "What is Private International Law," by W. E. Beckett; "Nationality in Mandated Territories Detached from Turkey," by Norman Bentwich; "The Juridical Basis of Arbitration," by R. Y. Hedges; "Extraterritoriality," by the late P. W. Thornely; "The Permanent Court of International Justice," by Sir Frederick Pollock; "Reservations to Multilateral Conventions," by H. W. Malkin; "The Nationality of Claims," by Sir Cecil J. B. Hurst. There are sections of interesting international notes, decisions, opinions and awards of international tribunals, decisions of national tribunals involving points of international law, a department of book reviews, a bibliography and a summary of international events.

Consolidated edition of decisions and opinions, Mixed Claims Commission, United States and Germany. (Washington: Government Printing Office, Vol. I, 1925; Vol. II, 1926.) The first volume contains administrative decisions and opinions of a general nature and opinions in individual *Lusitania* claims and other cases to June 30, 1925; the second volume continues the decisions and opinions from July 1, 1925 to October 1, 1926. The two volumes have continuous pagination of 885 and are indexed. Cloth, $1.70.

Mandate for Palestine. (Prepared in the Division of Near Eastern Affairs of the Department of State. Washington: Government Printing Office, 1927. pp. vii, 114. Paper, 20¢.) A documental exposition of the position taken by the Government of the United States relative to "A" mandates. It contains an introduction narrating the events leading up to the granting of the mandate of Palestine to Great Britain, and the texts of the notes and memoranda exchanged between that Government and the United States beginning in May, 1920, which preceded the conclusion of the American-British convention on December 3, 1924, and the exchange of ratifications of that convention a year later. The publication is regarded as in the nature

of an experiment by the Department of State and the Superintendent of Documents to see whether there is sufficient demand for this sort of publication to justify further efforts along the same line to make available to students original documents on special subjects of peculiar interest.

The Tacna-Arica Dispute. (By Graham H. Stuart, Associate Professor of Political Science, Stanford University. Boston: World Peace Foundation, 1927. pp. 136. Paper, 5¢.) A pocket sized history of the dispute from its inception to the recent arbitration by the United States ending with Secretary Kellogg's proposal for settlement on November 30, 1926. An appendix contains texts of the opinion and award of President Coolidge, March 4, 1925, his ruling and observations on April 9, 1925, General Lassiter's statement, June 14, 1926, and the resolution of the Plebiscitary Commission of the same date terminating the plebiscitary proceedings.

A Political Handbook of Europe. (Edited by Malcolm W. Davis. Published by the Council on Foreign Relations, Inc. New York: 1927. pp. 103. $1.00.) A survey, as of January 1, 1927, of the parliaments, parties and press of Europe, which should prove very valuable to libraries, newspapers, organizations engaged in work in the international field, students, editors and writers, for whose use it has been issued. It gives the names of the head of the government and the premier or other responsible leader, the political complexion of the cabinet, the representation of the various political parties in the parliament, a brief description of party programs and leaders, the names of the newspapers, their political affiliation, and the name of the proprietor or editor.

Addresses by Sao-ke Alfred Sze, Chinese Minister to the United States. (Baltimore: The Johns Hopkins Press, 1926. pp. ix, 131. $1.25.) Contains five addresses delivered on various occasions on the subjects of "The problem in China," "Causes of China's discontent: How they may be removed," "International aspects of the Chinese situation," "Extraterritoriality in China," and "China's unequal treaties." An introduction is supplied by Professor W. W. Willoughby of Johns Hopkins University.

The Grotius Society Publications: Texts for students of international relations. (London: Sweet & Maxwell, Ltd., 1927).

No. 5. Selections from the second edition of the *Abrégé du Projet de Paix Perpétuelle,* by C. I. Castel de Saint-Pierre, Abbot of Tiron, 1738. Translated by H. Hale Bellot, M.A., with an introduction by Paul Collinet, Professor of Law in the University of Paris. pp. 61. 2s. 6d. net.

No. 6. Jeremy Bentham's Plan for an Universal and Perpetual Peace. With an introduction by C. John Colombos, LL.D. pp. 41. 2s. 6d.

No. 7. Kant's Perpetual Peace. A philosophical proposal. Translated by Helen O'Brien, B.A. With an introduction by Jessie H. Buckland, M.A. (Oxon). pp. 59. 2s. 6d.

BOOKS RECEIVED

Académie de Droit International. Recueil des Cours. 1925. (3 Vols.) Paris: Librairie Hachette, 1926. Vol. I, pp. iv, 472. Index. Vol. II, pp. iv, 525. Index. Vol. III, pp. iv, 555. Index.

Archivo Histórico Diplomático Mexicano, num. 22. El Tratado de Paz con España (Santa Maria-Calatrava). Prólogo de Antonio de la Peña y Reyes. Mexico: Publicaciones de la Secretaria de Relaciones Exteriores, 1927. pp. xxix, 222.

Arminjon, P. *Précis de Droit International Privé.* Paris: Librairie Dalloz, 1927. pp. 303. 35 Fr.

Báez, Cecilio. *Curso de Derecho Internacional Privado Americano.* Asunción: Imprenta Nacional, 1926. pp. 157.

Bartz, Werner. *Deutsche Luftrechtspolitik seit Versailles.* (Völkerrechtsfragen, Heft 19.) Berlin: Ferd. Dümmlers Verlag, 1927. pp. 49. M. 3.

Beale, Joseph Henry. *A Bibliography of Early English Law Books.* Compiled for the Ames Foundation. With appendices. Cambridge: Harvard University Press, 1926. pp. viii, 304.

Bemis, Samuel Flagg. *Pinckney's Treaty.* Baltimore: Johns Hopkins Press, 1926. pp. xii, 421. Index. $3.00.

Birkenhead, The Right Hon. The Earl of. International Law. Sixth edition edited by Ronw Moelwyn-Hughes. London and Toronto: J. M. Dent & Sons, Ltd., 1927. pp. xxvi, 460. Table of cases. Index. 21s.

Bonner, Robert J. *Lawyers and Litigants in Ancient Athens.* The Genesis of the Legal Profession. With appendix and index. Chicago: University of Chicago Press, 1927. pp. xi, 276. $2.50, postage extra.

Burckhardt, Walther. *Die Organisation der Rechtsgemeinschaft.* Untersuchungen über die Eigenart des Privatrechts, des Staatsrechts und des Völkerrechts. Basel: Helbing & Lichtenhahn, 1927. pp. xvi, 463. Index. Sw. Fr. 22.

Bussmann, Otto. *Der völkerrechtliche Garantievertrag insbesondere der Entstehung des Genfer Völkerbundes.* (Frankfurter abhandlungen zum Kriegsverhütungsrecht, Heft 3) Leipzig: Robert Noske, 1927. pp. 66. RM. 5.

Calhoun, George M. *The Growth of Criminal Law in Ancient Greece.* Bibliography, index, and register of passages. Berkeley: University of California Press, 1927. pp. x, 149.

Cathrein, Victor. *Filosofía del Derecho.* El Derecho Natural y el Positivo. Segunda edición. Traducción directa de la segunda edición alemana por Alberto Jardón y César Barja. Madrid: Editorial Reus (S. A.), 1926. pp. viii, 288. 6.50 pesetas.

Duboscq, André. *Le Problème du Pacifique.* Paris: Librairie Delagrave, 1927. pp. 126. 7 Fr.

Fabela, Isidro. *Los Precursores de la Diplomacia Mexicana.* Archivo Histórico Diplomático Mexicano, num. 20. Mexico: Publicaciones de la Secretaria de Relaciones Exteriores, 1926. pp. 206.

Foignet, René. *Manuel Élémentaire de Droit International Public.* Paris: Rousseau et Cie., 1926. pp. iv, 706. Index.

Garner, James W. *Prize Law During the World War.* New York: Macmillan, 1927. pp. xlviii, 712. Index.

Gerber, Hans. *Die Beschränkung der deutschen Souveränität nach dem Versailler Vertrage.* (Völkerrechtsfragen, Heft 20) Berlin: Ferd. Dümmlers Verlag, 1927. pp. 84. M. 4.

Goebel, Dorothy Burne. *William Henry Harrison.* A Political Biography. Indiana Historical Collections, Volume XIV. With bibliography and index. Indianapolis: Historical Bureau of the Indiana Library and Historical Department, 1926. pp. 456. $1.50 plus postage.

Goebel, Julius, Jr. *The Struggle for the Falkland Islands.* New Haven: Yale University Press, 1927. pp. xiii, 482. ils. Index. $5.00.

Gonsiorowski, Miroslas. *Société des Nations et Problème de la Paix.* Paris: Rousseau & Cie., 1927. Tome 1, pp. 508; tome 2, pp. 547.

Harris, Norman Dwight. *Europe and Africa.* Being a revised edition of *Intervention and Colonization in Africa.* With appendices, bibliography and index. Boston: Houghton Mifflin Co., 1927. pp. xviii, 479. $4.00.

Hill, David Jayne. *The Problem of a World Court.* New York: Longmans, Green & Co., 1927. pp. xxvi, 204. Index. $1. 75.

Jahrbuch des Völkerrechts. (IX Band). Th. Niemeyer und K. Strupp. Friedensverträge Völkerbunddokumente Vergleichsschieds-und Sicherheitsverträge Allianzverträge 1919–1926. Kiel: Instituts für Internationales Recht, 1926. pp. xii, 543.

Thomas Jefferson, The Commonplace Book of. A repertory of his ideas on government. With an introduction and notes by Gilbert Chinard. Baltimore: The Johns Hopkins Press, 1926. pp. 403. Index. $4.00.

Jessup, Philip C. *The Law of Territorial Waters and Maritime Jurisdiction.* New York: G. A. Jennings Co., Inc., 1927. pp. xxvii, 548. Bibliography and index. $9.00.

The Judeans. *Judean Addresses.* Selected. Vol. III. New York: Bloch Publishing Company, 1927. pp. 216.

Jung, Eugène. *Questions d'Orient. L'Islam Sous le Joug.* (La Nouvelle Croisade) Paris: Chez l'auteur, 1926. pp. 95. 5 Fr.

Karger, Alfred. *Die Besteuerung der Ausländer und ausländischen Gesellschaften in Deutschland.* (Internationale Rechtspraxis, Heft 3) Berlin: R. L. Prager, 1926. pp. 31. M. 1.75.

Kaufmann, Paul. *Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg besonders durch den Locarno-Pakt.* (Frankfurter Abhandlungen zum Kriegsverhütungsrecht, Heft 2) Leipzig: Robert Noske, 1927. pp. 77. RM. 5.

Kiefe, Robert. *La Nationalité des Personnes dans l'Empire Britannique.* Paris: Librairie Arthur Rousseau, 1926. pp. viii, 191.

Kraus, Herbert. *Das Recht der Minderheiten.* Materialen zur Einführung

in das Verständnis des modernen Minoritätenproblems. Berlin: Georg Stilke, 1927. pp. 365. Index. RM. 10.

Kuhn, Arthur K. *Les Effets de Commerce en Droit International.* Paris: Librairie Hachette, 1926. pp. 76.

Kunz, Josef L. *Gaskrieg und Völkerrecht.* Vienna: Julius Springer, 1927. pp. iv, 84. 4.80 RM.

Kunz, Josef L. *Die Völkerrechtliche Option.* Breslau: Ferdinand Hirt, 1925. pp. xvi, 328.

Latané, John H. *A History of American Foreign Policy.* New York: Doubleday, Page & Co., 1927. pp. xiv, 725. Index. $4.00.

Lauterpacht, H. *Private Law Sources and Analogies of International Law* (with special reference to international arbitration). London and New York: Longmans, Green & Co., Ltd., 1927. pp. xxiv, 326. Index, bibliography, and table of cases. $8.50.

Lugo, J. Perez. *La Cuestión Religiosa en Mexico.* Recopilación de leyes, disposiciones legales y documentos para el estudio de este problema politico. Mexico: Publicaciones del Centro Cultural "Cuahtemoc", 1926. pp. 428.

Makarov, A. N. *Das Russische Zwischenprivatrecht.* Berlin: Hermann Sack, 1926. pp. 100. Index.

Matsunami, N. (editor). *The Report of the Japanese Maritime Law Association.* No. 11 (1926).

Norton, Henry Kittredge. *China and the Powers.* New York: John Day Co., 1927. pp. xi, 264. Maps, index.

Les Organizations de Blocus en France pendant la Guerre (1914–1918). Publié sous l'inspiration de Denys Cochin par un groupe de ses collaborateurs. MM. Jean Gout, Fouques-Duparc, Francis Rey, Jean Tannery, de Montardy, Thilly, vice-admiral Amet, Martin-Saint-Léon. Paris: Plon Nourrit et Cie., 1926. pp. ix, 291.

Owen, Robert L. *The Russian Imperial Conspiracy,* 1892–1914. New York: Albert and Charles Boni, 1927. pp. x, 212. $2.00.

Palmer, John McAuley. *Statesmanship or War.* New York: Doubleday, Page & Co., 1927. pp. x, 232. $2.50 net.

Perkins, Dexter. *The Monroe Doctrine, 1823–1826.* (Harvard Historical Studies 29) Cambridge: Harvard University Press. 1927. pp. xi, 280. Index. $3.50.

Petrascu, Nicolas N. *Les Mesures de Contrainte Internationale qui ne sont pas la Guerre entre États Membres de la Société des Nations.* Paris: A. Pedone, pp. 208.

Politis, Nicolas. *Les Nouvelles Tendances du Droit International.* Paris: Librairie Hachette, 1927. pp. 249.

Politische Wissenschaft. Die Entscheidungen des Internationalen Schiedsgericht zur Auslegung des Dawes-Plans. Berlin: Walther Rothschild, 1927. Heft pp. xiv, 222; heft 4, pp. xii, 267.

Quigley, Harold S. *From Versailles to Locarno.* A sketch of the recent

development of international organization. Minneapolis: University of Minnesota Press, 1927. pp. 170. Index.

Randall, James G. *Constitutional Problems Under Lincoln.* With bibliography and index. New York: D. Appleton & Co., 1926. pp. xviii, 580. $4.00.

Répertoire Général des Traités et Autres Actes Diplomatiques Conclus Depuis 1895 Jusqu'en 1920. [Institut Intermédiaire International.] The Hague: Martinus Nijhoff, 1926. pp. xx, 516. 18 Fr.

Shuhsi Hsü. *China and Her Political Entity.* A study of China's foreign relations with reference to Korea, Manchuria and Mongolia. New York: Oxford University Press, 1926. pp. xxiv, 438. Index.

Simonds, Frank H. *How Europe Made Peace Without America.* New York: Doubleday, Page & Company, 1927. pp. viii, 407. Index. $5.00 net.

Soubbotitch, Ivan V. *Effets de la Dissolution de l'Autriche-Hongrie sur la Nationalité de ses Ressortissants.* Étude de droit international et de droit comparé. Paris: Rousseau & Cie., 1926. pp. 315. Frs. 55.

Stewart, Irvin. *Consular Privileges and Immunities.* New York: Columbia University Press, 1926. pp. 216. Index. $4.00.

Strupp, Karl. *Wörterbuch des Völkerrechts und der Diplomatie.* Lieferung 14–18, Band III, bogen 1–40. Berlin und Leipzig: Walter de Gruyter & Co., 1926. pp. 640.

Szádeczky, Louis. *Revision of the Peace.* Opinions of English, American, French, Italian, Polish and Swedish writers and politicians on the Paris Peace Treaties. Selected, explained and furnished with maps. Translated from the Hungarian by Nicholas Gál. Budapest: Victor Hornyánszky Co., Ltd., 1926. pp. 135.

Temperley and Rowlatt. *Carriage of Goods by Sea Act, 1924,* Including the rules relating to bills of lading (the Hague Rules). With notes, etc. by Robert Temperley, M.A. Third edition, revised and enlarged. With appendices containing information as to the Dominion and Colonial statutes embodying the rules, and the American Harter Act, by the author and John Rowlatt, B.A. London: Stevens & Sons, Ltd., 1927. pp. xv, 128. Index. Net, 7s. 6d.

Thieme, Hans Wilhelm. *Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg.* Leipzig: Robert Noske, 1927. pp. 85. RM. 5.

Thomas, Elbert Duncan. *Chinese Political Thought.* A study based upon the theories of the principal thinkers of the Chou period. Foreword by Edward Thomas Williams, New York: Prentice-Hall, Inc., 1927. pp. xvi, 317. Index. $5.00.

Trías de Bes, José M. *Derecho Internacional Público y Privado.* Madrid: Editorial Reus (S. A.), 1926. pp. 366. 12 pesetas.

Ulloa, Alberto. *Derecho Internacional Público.* (Curso Universitario), Tomo I. Lima: Sanmartí y Cía., 1926. pp. 231. Index.

Verdross, Alfred. *Die Verfassung der Völkerrechtsgemeinschaft.* Vienna and

Berlin: Julius Springer, 1926. pp. x, 230. Index. 15 RM.

Vermeil, Edmond. *Les Origines de la Guerre.* Paris: Payot, 1926. pp. 254. Index. 20 Fr.

Vidal y Saura, Ginés. *Tratado de Derecho Diplomático.* Madrid: Editorial Reus, 1925. pp. 576. Index. 16.50 pesetas.

Walz, G. A. *Die Abänderung völkerrechtsgemässen Landesrechts.* Grundsätzliche Untersuchungen zum englischen, amerikanischen, deutschen und österreichischen Recht. (Völkerrechtsfragen, Heft 21) Berlin: Ferd. Dümmlers Verlag, 1927. pp. 174. M. 6.75.

Wehberg, H. *Das Genfer Protokoll betr. die friedliche Erledigung internationaler Streitigkeiten.* Eine Vorlesung an der Haager Völkerrechtsakademie aus dem Sommer 1925. Berlin: Georg Stilke, 1927. pp. 189. Index. RM. 5.

Wehberg, Hans. *Die Völkerbundsatzung.* Gemeinverständlich erläutert unter Berücksichtigung des Paktes von Locarno, des Berliner Vertrages mit Sowjet-Russland usw. Berlin: Hensel & Co., 1927. pp. 160. 3 Mk. Index.

Where Freedom Falters. By the author of *The Pomp of Power.* New York: Charles Scribner's Sons, 1927. pp. xxiv, 391. Index. $4.00.

Willoughby. W. W. *Foreign Rights and Interests in China.* 2 Vols. Baltimore: Johns Hopkins Press, 1927. Vol. I, pp. xxxvi, 543. Vol. II, pp. xvii, 543–1143. Index. $12.00.

Wilson, George Grafton. *Handbook of International Law.* 2nd ed. St. Paul: West Publishing Co., 1927. pp. xxii, 567. Index.

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PROGRESS OF THE WORK OF THE LEAGUE OF NATIONS CODIFICATION COMMITTEE

By Jesse S. Reeves

Professor of Political Science, University of Michigan

With the adoption of a resolution by the Council of the League of Nations, transmitting the report of the Committee of Experts for the Progressive Codification of International Law to the Assembly,[1] what may be called the preliminary work of that Committee has reached such a stage that it seems possible to review its activities in the process of codification adopted by the League of Nations. It will be remembered that the Hague Commission of Jurists in its report accompanying the Statute of the World Court recommended the creation of agencies for codification, and that Lord Robert Cecil's opposition to codification delayed acceptance of the Commission's recommendation until September, 1924, when the Assembly upon the initiative of Sweden provided for the appointment of a committee of experts.

The Committee appointed by the Council under the terms of reference had three functions: (1) "to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable at the present moment," thus incorporating one of the recommendations of the Hague Commission of Jurists; (2) to communicate the list to the Secretariat of the League and, after reference to the governments of the various states, members and non-members of the League, "to examine the replies received"; and (3) "to report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution."

The Committee appointed by the Council pursuant to this resolution consists of sixteen members, from, but not representing, as many countries, all men of distinction in the field of international law, the results of whose deliberations are entitled to the greatest attention and respect. They certainly meet the test of the Assembly resolution that they should "not merely possess individually the required qualifications but also as a body represent the main forms of civilization and the principal legal systems of the world."

At the first session of the Committee, April 1–8, 1925, a provisional list of eleven subjects in the public international law of peace was adopted, those relating to war and neutrality, as well as those in private international law, being deferred. A subcommittee, usually of three members, was

[1] League of Nations, C. 196, M. 70, 1927, V.

created for the examination of each of these subjects for the primary purpose of determining whether it was one "the regulation of which by international agreement would seem to be most desirable and realizable at the present moment." The Committee asked the coöperation of the various organizations interested in international law in the preparation of supplementary lists. The provisional list of the first session included the following: (1) Nationality, (2) Territorial Waters, (3) Diplomatic Privileges and Immunities, (4) Government Ships engaged in Commerce, (5) Extradition, (6) State Responsibility, (7) Procedure of International Conferences and Treaty-making, (8) Piracy, (9) Prescription, (10) Sea Products, and (11) Extraterritorial Crime. At the second session, held January 12 to 29, 1926, the Committee received and adopted reports from each of its subcommittees. Selecting seven of the eleven subjects with which to proceed further, a questionnaire was formulated as to each, to be submitted to the various governments, thus performing the second of the functions of the Assembly's resolution. These were: (1) Nationality, (2) Territorial Waters, (3) Diplomatic Privileges and Immunities, (4) State Responsibility, (5) Procedure of Diplomatic Conferences and Treaty-making, (6) Piracy, and (7) Sea Products. Extradition and Extraterritorial Crime were stricken from the provisional list. Prescription was placed upon the agenda of the third meeting. All of these questionnaires and reports were printed in a supplement to this JOURNAL and have received extended editorial comment in its pages.[2]

At the third meeting, held March 22 to April 2, 1927, the Committee, upon reports made by new subcommittees, added four subjects to its list: (8) Communication of Judicial and Extra-Judicial Acts on Penal Matters, (9) Legal Position and Functions of Consuls, (10) Revision of the Classification of Diplomatic Agents, and (11) Competence of Courts as to Suits against States. As to each of these a subcommittee has prepared a report and questionnaire. The Committee at this session had before it reports upon three subjects which were at least temporarily eliminated, *viz.*, (a) The Most Favored Nation Clause, (b) Recognition of the Legal Personality of Foreign Commercial Corporations, and (c) Nationality of Commercial Corporations and their Diplomatic Protection, making a total of eighteen subjects considered by the Committee, eleven of them being referred to the various governments for their replies. Conventional regulation of the most-favored-nation clause was held not to be feasible, if desirable, while the two problems connected with commercial corporations had already been placed upon the agenda of the conferences upon private international law which the government of the Netherlands proposes to convene.

Replies to Questionnaires 1 to 7 having been received, examined and analyzed by the appropriate subcommittees, the Committee was in a position to perform the third function of its mandate. Having thus a tentative

[2] Special Supplement to the AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 20, July and October, 1926.

list of subjects, each with a questionnaire and report, together with the replies of the governments, the Committee undertook to formulate, in three reports, a form of procedure to be followed with a view to preparing eventually for conferences for the solution of the problems presented. One report is on the general procedure to be followed, the other two deal with the peculiar nature of the problems raised by Questionnaires 5 and 7.

So far the Committee is not committed to any position other than to set forth seven subjects as "sufficiently ripe" for consideration at an international conference. The various reports, "solutions," many of them elaborate and exhaustive, some of them embracing tentative draft codes, upon the subjects considered, are, after all, in the judgment of the Committee, only expressive of "the opinion of the *rapporteurs* or subcommittees, but they may nevertheless prove acceptable as a basis for discussion." The Committee has only had the duty, and has only been able, to give an opinion as to the desirability and possibility of formulating rules for the question mentioned. The Committee, however, recognized the necessity of draft projects to be submitted to the various governments in advance of an international conference, although this was not provided for in the "temperate" resolution of the Assembly. In this there will be general agreement. Either the Committee should have its powers enlarged, or some other instrumentality (preparatory commission or unofficial body) will have to prepare such draft projects. Without them as bases for discussion, no international conference "would," as M. Scialoja remarked in the Council meeting of June 13 last, "result, at any rate to a certain degree, in concrete proposals which could be accepted by the governments." The International Commission of American Jurists meeting at Rio had before them thirty draft projects. Some of those had been severely criticized by one of the members of the League of Nations Committee in the British Year Book of International Law for 1926, but certain of them are favorably commented upon in the various reports of the subcommittees. Whatever their shortcomings, they have served as bases for discussion and resulted in agreements at Rio upon twelve draft projects now submitted to the governments of the twenty-one republics of the Americas for final review at the forthcoming Pan American Conference at Havana.

It is not only the restricted nature of the Committee's mandate which limits its work, but it is hampered also by the extremely limited financial allowances made it by the League which permit of but one meeting of the Committee in each year, and these not prolonged sessions; the first lasted for one week, the second and third for about two weeks each. The Committee realizes the possible inadequacy and incompleteness of the work thus far accomplished, as it calls attention to the importance of further preparatory work in the form of "collecting and classifying all the historical, legislative and scientific data which may be of interest to the contemplated conference." Admitting, therefore, that the preparatory work thus far accomplished

is incomplete, and that much remains to be done before a conference may profitably be held, and refraining from any suggestion as to whether such a conference might properly be arranged for in the immediate future, the Committee decided that "four or five of the [seven] subjects recommended as ripe for international agreement" might well be considered by a single conference, for which "the various Governments could select delegates possessing the various qualifications appropriate to rendering the most effective service in treating these subjects—not merely jurists but economists, statesmen and men familiar with questions of commerce and shipping." On the remaining two subjects the committee made special reports as to procedure. On Questionnaire 5 (Procedure of International Conferences and Treaty-making) examination by a small committee of experts was recommended. This should be authorized to draft a code of procedure to serve as a basis for discussion in an international conference called to consider this subject. On Questionnaire 7 (Exploitation of the Products of the Sea) the Committee recognized the highly technical character of the problems involved, problems which had already received attention from special scientific organizations, international in character. These should be invited to coöperate—in particular the Permanent International Council for the Exploration of the Sea at Copenhagen. The conference should be composed of experts in applied maritime zoölogy, representatives of the marine products industries, and jurists, these to collaborate with the Copenhagen Council.

The report of the Committee came before the Council of the League at its June meeting, accompanied by the special report thereon of M. Zaleski, the Polish representative. In the latter the present League processes for the development of international law were considered, the Committee's labors appraised, and further steps suggested, including the calling of a conference. "The Assembly," M. Zaleski remarked, "would no doubt have performed a popular act if it had disregarded the real nature of the problem presented by the aspiration for the codification of international law, and the importance and extent of the existing agencies through which the needs of nations for the development of rules governing their mutual relations are already being gradually met, and had sought to put the League in the position of an organization which proposed forthwith to secure the regulation of international relations in general by fixed and written rules, *i.e.*, the immediate codification of international law. In fact, the Assembly took the much more modest decision to employ a committee of experts to advise as to whether there were any questions of international law, not forming the object of existing initiatives, in regard to which the conclusion of general agreements could be considered to be immediately desirable and realizable. The work of the Committee shows that this moderation was well judged." M. Zaleski concurred in the Committee's recommendation of a single conference to consider the recommended subjects, but feared that

its programme might be "overcharged if all the subjects recommended by the Committee were taken up." He suggested, therefore, the elimination of Piracy and Diplomatic Immunities as not being "urgent." This would leave, if M. Zaleski's suggestion were adopted, for the consideration of the first conference the topics of Nationality, Territorial Waters, and State Responsibility. He hoped that such a conference would not be too long delayed, not later than 1929. While such a conference might be called by the Council at the request of the Assembly and at the League's expense, he suggested, as an alternative, that the conference be convened by a government. "This course, by which one of its members would act for the League, at the League's request, could not be regarded as implying in any way that the Assembly desisted from the initiative taken by it in 1924, or that the League was ceasing to interest itself in the development of international law." As the matter is one to be decided by the assembly, the resolution adopted by the Council merely transmits the committee's documents with M. Zaleski's report to the Assembly, placing their consideration upon the agenda of that body. M. Zaleski's suggestion, however, that a conference be convened by a government at the request of the League received an immediate response from M. Beelaerts Van Blakland, representative of the Netherlands upon the Council. His government, he said "which was anxious to be as helpful as possible in giving effect to the Assembly's desires, would have very great pleasure in carrying out to the best of its ability any such request if made to it."

It would seem, considering the reports of the Committee and of M. Zaleski, that of the eighteen provisional topics considered by the Committee there is more general agreement that there are three which are: (a) "sufficiently ripe" for international agreement, (b) are not such, to quote M. Zaleski again, "in regard to which dangerous international disagreement is likely to result from existing doubts as to the applicable rules," and (c) which might be considered in one international conference. These are Nationality, Territorial Waters, and State Responsibility. Each of these topics appeared to the International Commission of American Jurists at the Rio meeting as distinctly lacking in the three characteristics stated, and upon none of them was agreement found to be practicable. The fact is that there is a certain clash between the criteria of urgency and of absence of possible disagreement. If there be little chance for disagreement in the statement of the law upon a given topic, no government is apt to feel an urgent need for its formulation. And here lies, one may add, a very real difficulty in the codification processes. Foreign offices, busy with policies, have no time and little interest in matters which appear to them academic. Yet it may be useful to recall in this connection that the subject of diplomatic immunities which M. Zaleski dismisses as lacking in urgency is exactly one upon which the Rio Commission was able to formulate a project, and one believed to be of considerable value.

One may inquire a little farther into the question of the availability of these topics for codification by examining the replies of the various governments to the questionnaires propounded to them. These replies are, so far as received up to June last, printed in full. They are also summarized in the Committee's report to the Council, and analyzed by the *rapporteur* of each of the appropriate subcommittees. We are told that these questionnaires were addressed to "all governments," but not exactly which and how many governments were included, presumably about fifty. More than a year has been allowed for the consideration of the questionnaires by the governments, and no single question was replied to by more than thirty-four. A number of governments consistently limited themselves to more or less categorical answers to the question "is or is not X a subject possible or desirable to attempt at present to codify." Such are, in effect, those of Australia, the British Empire, India, the Irish Free State (Canada and New Zealand made no replies), Italy, Japan, Yugoslavia and Venezuela. Some, *e.g.*, Argentina and the Irish Free State, answered one questionnaire only. In several instances the governments have replied by detailed observations upon the reports of the various subcommittees. Perhaps the most elaborate is Roumania's memoir upon Piracy. Finally, the geographical distribution of the responding governments is not without interest. Of the thirty-seven governments replying to one or more of the questionnaires, twenty-one were European and only nine American states. This preponderance of European expression may be explained in a number of ways. Only one country did not reply which had a national upon the Committee, and this was China. Of the fifteen remaining countries having nationals upon the Committee, ten are European, three American. The scarcity of American replies may be due in part to the pendency of the Rio meeting, which was in session while the Committee's report was being printed. Indeed the reply of Cuba upon State Responsibility suggests that as "the subject is of exceptional interest to America, we feel that Cuba should not agree to its settlement by the Committee until the American Countries have expressed their final opinion at these [Rio] Conferences."

Twenty-nine governments replied to the questionnaire upon Nationality and only two of them are opposed to consideration of the subject. Thirty-one gave answers to that on Territorial Waters, of which three were opposed to its consideration; thirty-four responded to that on State Responsibility, with four in opposition.

Before considering these answers in greater detail it might be well to quote the reply of the United States, dated October 12, 1926, which briefly addressed itself to all seven of the questionnaires:

> It is the view of the Government of the United States that international arrangements on the general subjects of: (1) Nationality, (2) Territorial Waters, (3) Diplomatic Privileges and Immunities, (4) Responsibility of States in respect to Injury caused in their Territory

to the Person or Property of Foreigners, which are the first four subjects mentioned in the communication of the Secretary-General, would serve a useful purpose and would therefore be desirable, and that there would be no insuperable obstacles to the concluding of agreements on these subjects. The Government of the United States is not prepared at this time to state whether all the points mentioned in the questionnaires on the subjects referred to would yield to regulation by international agreement, nor does it desire to express an opinion regarding the desirability or possibility of regulating all other points by international agreement until it has had opportunity to make a more intensive study of them than it has yet done. The details would seem to be proper matters for discussion in any negotiations which may ensue.

With respect to the fifth subject, namely, procedure for the concluding and drafting of treaties, the Government of the United States perceives no real necessity for the regulation of these subjects by international agreement. It would seem that the determination of the procedure of international conferences might well be left to the discretion of the delegates representing the Governments participating in such conferences and that the procedure for the drafting and concluding of treaties might be left for determination by the parties negotiating them.

With regard to the sixth subject enumerated in the communication of the Secretary-General, namely, Piracy, it is the view of the Government of the United States that piracy, as that term is known in international law, is so nearly extinct as to render of little importance consideration of that subject as one to be regulated by international agreement.

With respect to the seventh subject, namely, Exploitation of the Products of the Sea, the Government of the United States is of the opinion:

1. That international regulation of certain fisheries, such as those for whales, is desirable and should be realizable.
2. That information as to the status of fisheries for most of the true fishes is not sufficiently complete to admit of the formulation of regulations at the present time.
3. That in most cases particular fisheries may best be regulated by treaties between the nations most directly concerned.
4. That investigations to determine the need for and character of regulations to sustain the various fisheries should be encouraged; and
5. That an international conference is desirable to consider the problem of conserving the whale.

The subject of nationality had been considered in an elaborate report by M. Rundstein of Poland, to which was attached a preliminary draft convention, the result of the Committee's discussion. "Nine states are in favor of an immediate codification of questions relating to nationality though they do not mention details," M. Rundstein remarks. These are Australia, Brazil, Bulgaria, Czechoslovakia, France (with reservations), Poland, Salvador, Yugoslavia and the United States. "Twelve countries, while recognizing that the subject is suitable for codification and that international regulation may ultimately be undertaken, consider that cer-

tain clauses in the preliminary draft are at variance with the provisions of their municipal law." These are Austria, Cuba, Egypt, Esthonia, Finland, Greece, Japan, Norway, Roumania, Spain, Sweden, and Switzerland. The British Empire and India do not believe the international regulation of the subject possible or desirable except as to double nationality and statelessness, while Italy and Venezuela give "definite negative replies." Belgium does not favor attempted regulation by general international agreement, and the Netherlands desire the matter left for consideration by the sixth and seventh Hague Conferences upon Private International Law. There is not sufficient space here to consider in greater detail the various replies, but in examining them one reaches the conclusion, however reluctantly, that they are not such as to promise great likelihood of agreement, embedded as the problem is in seemingly fundamental differences in the various municipal systems. Yet what in the field of international law is more urgent than the resolution of conflicts of law resulting in double nationality?

Upon the question of Territorial Waters one is again confronted by the variations of municipal law and of claims to jurisdiction. All agree that the marine league is a minimum, but fundamental differences arise in its measurement. On the other hand, there is no unanimity in existing practice as to a maximum of jurisdictional range for all purposes. The various governments had for consideration Dr. Schücking's learned report with the revised draft convention attached. Twenty-one states admit the possibility and desirability of a convention upon this subject, namely, Germany, Australia, the British Empire, Bulgaria, Cuba, Denmark, Esthonia, the United States, Finland, Greece, India, the Irish Free State, Japan, Portugal, Roumania, Salvador, Yugoslavia, Sweden, Czechoslovakia, and Venezuela, surely an impressive list. Yet France, Italy, and Poland responded in effect that the conclusion of a convention is neither possible nor opportune, while Norway and the Netherlands were non-committal. Austria and Switzerland have no concern in the matter and Spain is opposed to the limitation of three marine miles. The impression gained from reading all of the replies is, after all, one of hope.

Questionnaire 4, including two questions, *viz.*, "Whether and, if so, in what cases a state may be held responsible for damages done in its territory to the person or property of foreigners," and, "whether, and if so, in what terms it would be possible to frame an international convention whereby facts which might involve the responsibility of states could be established, and prohibiting in such cases recourse to measures of coercion until all possible means of pacific settlement have been exhausted," was accompanied by a report by Dr. Guerrero of Salvador as *rapporteur* of the Subcommittee, —a document which has received considerable attention as the importance of this thorny subject testifies. It may be remarked that Dr. Guerrero's report proceeds upon a theory of minimum state responsibility: liability as to political crimes only when the territorial government has been negligent

either before or after the crime, but not defining the term "political offense"; non-liability for acts of a government official outside the scope of his competence; non-liability for judgments of courts except for substantial "denial of justice"; and non-liability for loss through riot or insurrection save when amnesty has been granted. The conclusions were severely criticized in the answers of several governments. As already quoted from the reply of Cuba the question is of peculiar interest in the Americas. The United States expressed no opinion upon Dr. Guerrero's report, nor did Haiti; Argentina was non-committal, Brazil was generally favorable, as was Chile. Salvador naturally endorsed the report, but Venezuela eliminated the subject as not sufficiently ripe for international conferences. The experience of the Rio Commission attested the correctness of Venezuela's position, for after a number of projects had been presented the matter was dropped. The British Empire referred to the Guerrero report as follows: "while making many excellent suggestions, [it] contains conclusions with which His Majesty's Government are not in agreement." The reply of France was that "questionnaire No. 4 too closely affects the internal or the external policy of States, their social life and the stability of their institutions for it to be possible, without serious danger, to propose to establish conventional or general stipulations acceptable by every State in its relation to other states." As a *ballon d'essai* the Guerrero report, therefore, is of considerable importance. It at least shows from which way the wind blows.

The Assembly will have before it at its present meeting the Committee's report of progress. It was remarked by M. Scialoja in the June meeting of the Council that "international law was developing very rapidly, but he did not think that the end was within reach." Meanwhile the Committee is continuing its work in accordance with a procedure which may be called established. Questionnaires 8, 9, 10, and 11 have been submitted to the various governments, the answers to be returned before January 1 next. If the Committee moves slowly, too slowly for some enthusiasts, it is to be remembered that it can move no more quickly than the inadequate provision made for it by the League of Nations permits.

NATIONAL ECONOMIC INDEPENDENCE IN THE LIGHT OF THE INTERNATIONAL ECONOMIC CONFERENCE[1]

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The wave of exaggerated nationalism which has pervaded the nations of the earth generally since the World War has been accompanied by seemingly serious efforts on the part of national governments to arrange for the production within their territorial limits of as many as possible of the articles which their peoples consume, often quite heedless of the cost of home as compared with external production. Such disregard of economic laws could scarcely have failed to aggravate the poverty in which the world was inevitably left in the wake of the war. Political leaders have seemed wholly unmindful of the essential truth of economics, namely, that destruction and waste, the accompaniments of war, cannot be indulged in without a lowering of economic standards, that those standards can only be raised by production, and that recovery is accomplished in the measure that production is achieved at the place and by the methods which make possible the largest output of consumable goods in proportion to the labor and raw material involved. Persistent neglect of this elementary principle by both peoples and their governmental agents made necessary its authoritative restatement, together with an indication in detail of the actual governmental practices which continued to thwart the world's return to economic welfare. In its broadest aspects, the report of the International Economic Conference, convoked at Geneva by the League of Nations in May, 1927, approximated such a pronouncement. It is a document of which every portion constitutes an argument against the "go-it-alone" attitude that has characterized so much recent economic legislation. National economic independence is a subject that may perhaps best be considered after making a somewhat detailed examination of the background and accomplishments of the Geneva Conference—"The World Economic Conference," as it is designated in its final report.

(1) THE BACKGROUND OF THE CONFERENCE

While the vast majority of treaties, economic and otherwise, are entered into between two countries only, the general or multipartite international contract is rapidly assuming an outstanding place in the law of the nations. Seeking as it does a uniform set of standards and rules for all countries, every

[1] Based upon a lecture delivered by the writer at the Naval War College, Newport, Rhode Island, July 8, 1927.

country being usually invited to adhere, the multilateral treaty furnishes certain advantages not otherwise obtainable in the development of international coöperation. The later nineteenth and early twentieth centuries witnessed a significant development in this method of approach to international legislation. Through the instrumentality of the League of Nations, conventions of potential world-wide application, dealing with communications, railroads, freedom of transit for goods through the territories of intermediate countries, transmission of electrical energy (perhaps correctly to be considered as an economic necessity in some countries), customs formalities, hours of labor, and other subjects, have recently been concluded, and most of them have come into force with numerous states as parties.[2]

Among these conventions an excellent example, effective only within the recent past, relates to the International Régime of Maritime Ports.[3] By its terms the parties mutually promise to the ships of each the same treatment in their ports that they accord to ships flying their own national flags. Such equality of treatment, technically referred to as "national treatment of shipping," is required by the provisions of many bilateral treaties, including a large number to which the United States is a party. Its universal acceptance and maintenance will assure the nations of the world that the ports of the world will be kept open to their ships, whether bringing goods for sale or seeking raw materials or other commodities, and will thus prove an additional guaranty of access to the things needed in modern civilized society and for the preservation of national economic well-being, which manifestly bears a very intimate connection with the independence of a nation.

Prior to the actual drafting of multilateral treaties, prolonged discussion is usually necessary in order to arrive at substantial agreement regarding the principles upon which they are to be based. The League of Nations has characteristically called meetings for such discussion before convening conferences of plenipotentiaries authorized to sign completed instruments. In the notable case of the Brussels Financial Conference, 1920, the statement of principles agreed upon has proven valuable as a guide less perhaps in the subsequent formulation of international engagements than in the conduct of national administration. This setting up of correct standards regarding a wide range of international economic problems was the sole objective of the 1927 Conference, probably the most pretentious gathering of its kind ever called together. It was the subject of painstaking and elaborate preparation, covering a period of more than a year and invoking the aid of two conferences of a large preparatory committee, as well as of other international organizations.

[2] For information on this subject see Report on Economic Work of the League of Nations, Document C. E. I. 41, prepared for the International Economic Conference.

[3] The text has been published in pamphlet form, with discussion, by the Department of Commerce.

The Assembly of the League of Nations, in its resolution of September 24, 1925, concerning the convocation of the International Economic Conference, sought economic peace and the resulting increased security and prosperity of the world. Bearing this objective in mind, the conference, during its sessions, sought to discover and analyze the fundamental causes of the economic ills from which the world, nearly nine years after the Armistice, continues to suffer, and to discover at least partial remedies for them.

(2) THE WORLD ECONOMIC SITUATION IN 1927[4]

The economic situation of the world today is indicated in the preparatory documents which were published by the League of Nations for the use of the Conference. Comparing the years 1913 and 1925, an increase in population of about 5 per cent, in output of raw materials and foodstuffs of 16 per cent to 18 per cent, and in volume of international trade of about 5 per cent, is indicated. For Europe alone the corresponding figures are 1 per cent, 5 per cent and −11 per cent, respectively; accompanied by unemployment, burdensome taxation and inadequate savings. Europe's reduced consuming power adversely affects the rest of the world.[5]

The incidence of these harmful results of the World War has not fallen with equal weight upon all industries. Certain of them were artificially expanded to meet war needs; others suffer from diminished demand resulting from loss of purchasing power and substitution of competing commodities. Outstanding examples are the iron and steel, chemical, coal, cotton, and, especially, ship-building industries—which last faces an increase of 38 per cent in the world's mercantile tonnage whereas the volume of goods carried by sea has hardly increased at all. On the other hand, producers of motor cars, artificial silk, rubber goods, *et cetera*, have prospered. Agriculture, which is progressively adopting the processes and methods of industry, suffers directly from the fact that prices of industrial products in certain countries have for some years remained relatively high as compared with the prices obtainable for the farmer's output.

Post-war attempts to seek prosperity through economic isolation the Conference found to have failed. Prosperity, its report continues, cannot

[4] The Final Report of the World Economic Conference has been published in pamphlet form as Document C. E. I. 44 (1) by the League of Nations. The economic situation is discussed on pages 15, 16, and 17. The various statements and recommendations hereinafter described appear textually in subsequent pages of the report. The full text of the report is also published in The Monthly Summary of the League of Nations (Vol. VII, No. 5), June 15, 1927, and as a special supplement to The Economist (London), May 28, 1927.

[5] In addition to the Final Report, see Document C. E. I. 3, Memorandum on Production and Trade, prepared for the conference. The figures relating to foodstuffs do not include China. The official statement regarding the decrease of European trade indicates that it was, in 1925, 89 per cent or 90 per cent of its level in 1913. One of the delegates, Mr. Layton, editor of The Economist, is quoted as saying that trade in 1925 was 94 per cent of pre-war—"World Business at Geneva," a pamphlet distributed by McGraw-Hill Publishing Company, Inc., p. 27.

be enjoyed in compartments; the interdependence of nations is made evident. The problems left by the war, it is stated, cannot be solved by a return to pre-war ideas and conditions. The great immediate post-war problem of disorganized currencies is no longer a factor of primary importance in depressing trade and production. Capital, moreover, though still inadequate, has increased, as increased production has widened the margin of savings. Many trade obstructions have been removed. Yet a new situation exists, and remedies of a kind unknown to pre-war days must be found.

Among the changes brought about by the war some will, the Conference believed, affect the situation for many years. War debts and war pensions will keep taxes high. The debtor and creditor relation of nations has shifted. Facility of migration has in some directions been reduced, with consequent industrialization in centers of rapidly increasing population and demand on their part for raw materials. War dislocations in commerce greatly stimulated the movement for the establishment of manufacturing industries in non-European countries. European currency disorders have given rise to conditions in which wage disputes and social disturbances have manifested themselves. "Rationalization" is necessary to the restoration of the economic position. Liberty of trading remains substantially less than before the war. Tariffs are higher, more complicated, more unstable, and more numerous; the system of commercial treaties is less developed; tariffs designed for bargaining have sometimes been made effective in advance and conventional reductions have not always followed.

(3) GENERAL RESOLUTIONS OF THE CONFERENCE

The Conference recognized that the maintenance of world peace depends largely upon the economic policies which nations pursue, and it recommended that the countries represented should give attention to this fact and seek means for the elimination of economic disputes. The Conference also expressed the hope that success would attend efforts to reduce armament, with resulting tax reduction and increased savings available for industrial development. Appreciating the essential nature of a public opinion favorable to the principles it laid down, the Conference bespoke the aid of the press and closer coöperation of scientific and educational institutions in obtaining endorsement and support for its stated principles. In deference to the insistence of the Russian delegation for recognition of the Communist economic system, the Conference stated that it regarded "the participation of members of all the countries present, irrespective of differences in their economic systems, as a happy augury for a pacific commercial coöperation of all nations."

(4) RESOLUTIONS ON COMMERCE

In introducing the report on commerce—which incidentally is twice as long as those on industry and agriculture put together—the Economic

Conference immediately called attention to the detrimental effect upon the general welfare of existing trade barriers, especially in Europe. The need for concerted action appeared to it manifest. Nationalistic tendencies to pursue narrow policies, if prevalent in one country, inevitably encourage the forces that seek the development of such tendencies in other countries. Parallel action, on the other hand, makes possible completely reciprocal assurances that concessions made by one country will equally be required of all, to the common benefit. Nevertheless individual national action was recommended as a basis for wider action, and it was asserted that countries must not allow delay on the part of others to form an excuse for postponing measures individually incumbent upon them. The Committee on Commerce believed that it was the unanimous desire of the members of the Conference to make sure that it should, "in some way, mark the beginning of a new era, during which international commerce will successively overcome all obstacles in its path that unduly hamper it, and resume that general upward movement, which is at once a sign of the world's economic health and the necessary condition for the development of civilization."

Liberty of Trading. After considering liberty of trading, a subject not to be confused with "free trade," the Conference condemned the system of import and export prohibitions and restrictions and the privileges sometimes granted to state enterprises; moreover, it recommended greater liberality than is in some places now shown to foreign nationals and companies in the exercise of their commercial activities. Regulations have been very numerous since the World War, particularly in Central and Eastern Europe, the effect of which is to restrict or prohibit altogether the international movement of certain goods. While directed in large part against luxuries, they have also seriously affected necessaries and have run athwart the principles of uninterrupted access to supplies and to opportunities for transporting them which are essential to the practical economic life of nations. An international diplomatic conference on the subject is to be convened October 17th of this year for the purpose of concluding a convention that will undertake to minimize this evil. The Economic Conference recommended also the convening of a diplomatic conference "for the purpose of determining the best methods of defining the status of foreigners, of abolishing unjust distinctions between them and nationals, and of preventing double taxation;" as well as to prepare an appropriate international convention on the subject.

Customs Tariffs. Some of the difficulties which commerce faces in the matter of customs tariffs are quite apart from the question of protection of the home market, that is, from the high or moderate rates of duty which prevail. In recent enactments there has been an enormous increase in complexity. The utmost detail in subheadings appears, adding greatly to the uncertainty regarding the classification to which a given article may belong and consequently to the doubt as to what duty will be imposed. The Economic Conference held that governments "should refrain from this

practice as far as possible," and especially that they should "avoid tariff subheadings which do not refer to articles of a different nature and which are merely intended to discriminate between articles of different origin." It may be stated parenthetically that minute tariff classifications have been a favorite method employed by countries which desire to avoid the obligation of their promises to accord equality of treatment to the goods of other countries.

Nomenclature is a subject filled with difficulties in connection with tariff schedules. Different terms may be used by different laws to describe the same commodity. The Economic Conference considered that "a fixed nomenclature for goods subject to customs duties is an essential condition of equity in their application and ease in their collection," that "it may also contribute to the exchange of goods not subject to duty," and that it may constitute "a favorable basis for the improvement of trade statistics." Here again international agreements are recommended as a means of eliminating this hindrance to the movement of goods from countries where they are produced to countries where they are needed.

Instability, or frequent alterations in tariff duties, is another serious obstacle to trade. Concerning it the Conference proposed:

> (1) That states should refrain from making frequent or sudden changes in their customs duties on account of the instability which such changes cause in trade relations and the serious difficulties or disputes which they occasion in connection with the execution of contracts already concluded;
>
> (2) That in cases in which currency stability has not yet been fully secured, customs duties should be levied on a gold basis, or their incidence should be periodically adjusted on the basis of an official index of prices, the adjustment to be made only at dates fixed in advance and only when alterations of incidence represent an appreciable percentage of the duties;
>
> (3) That, in commercial treaties, as wide a use as possible should be made of the guarantees of stability afforded by the consolidation of duties, or in cases in which currency stability is insufficient to allow of the consolidation of the duties themselves, by any other means for adjusting the incidence of duties;
>
> (4) That States should conclude their commercial treaties for as long a period as possible, and should follow, in this regard, the policy practiced by a large number of countries before the war.

The activities of the United States Treasury and Tariff Commission investigators in Europe were directly responsible for the following resolution, which was unopposed by the American delegation:

> That any system of enquiries or investigations in connection with the application of *ad valorem* duties or modification of tariffs shall be framed and administered with full regard for the business interests involved and for the maintenance of commercial good will among nations. Enquiries or inspections involving inquisitional procedure or arbitrary methods shall be eliminated.

Further simplification of customs formalities and improvement in the comparability of international trade statistics formed the subject of other resolutions.

Commercial Policy and Treaties. The outstanding important subject of the level or height of tariffs was discussed in connection with the broader aspects of international commercial policy, and in relation to commercial treaties. Concerning the present tariff situation the Conference said:

> The evidence before the Conference, which is contained in the documentation or in the statements made by the members of the Conference, shows that the recovery from the effects of the war has been unduly delayed and that the foreign commerce of all nations is in greater or less degree seriously hampered by existing obstacles to trade.
>
> The Conference notes with satisfaction that some of the more injurious forms of obstruction that prevailed immediately after the war have been removed. To this fact must be attributed in part the recovery of world trade which has so far been achieved.
>
> Tariffs, on the other hand, which in recent years have shown a tendency to rise, are for the most part higher than before the war, and are at present one of the chief barriers to trade. The increase in most countries is almost wholly due to higher duties on manufactured articles.
>
> In Europe, the problem has been complicated by political readjustments which have changed many frontiers and increased the number of separate customs units from 20 to 27, all of which strive for an independent national economy which they defend by means of tariff barriers.
>
> The harmful effect of these tariffs upon trade has in many cases been increased through their constant changes, which have created an element of uncertainty and made it impossible to place long contracts. The nations have failed to deal with this situation by long-term treaties.

Among the causes were noted the currency upheavals following the war, attempts to perpetuate war-born industries and to keep labor employed, alleged needs of national defense and the national revenue, imposition of retaliatory tariffs in advance of negotiation, and fruitless efforts to establish independent national economies.

Concerning the last-mentioned item, the Conference said:

> The desire to deal with the problem of excessive industrial capacity has usually led to an attempt to reserve the home market for home production by means of tariff barriers erected with a view to creating an independent national economy capable of producing, under the protection of the tariff wall, an increase of invested wealth and a more satisfactory return for the work of the nation. This effort to attain self-sufficiency cannot hope to succeed unless it is justified by the size, natural resources, economic advantages and geographical situation of a country. There are very few countries in the world which can hope to attain it.[6] The artificial increase of plant which is only partly employed has meant not only uneconomical and costly production but

[6] On this point see *infra*, subdivision (8).

also a wasteful use of the world's reduced capital resources. It has thus been one of the causes which has maintained an abnormally high rate of interest in recent years. It should be added that, so long as unduly high tariffs are maintained, this uneconomic use of capital continues and creates an increasing number of vested interests which resist a return to a sounder policy.

While not undertaking to pass judgment on the fundamental principles of protection and free trade, the Conference did express its opinion "that governments should immediately prepare plans for removing or diminishing by successive stages those barriers that gravely hamper trade, starting with those duties which have been imposed to counteract the effect of disturbances that are now past." Its conclusion was thus expressed:

> In view of the fact that harmful effects upon production and trade result from the high and constantly changing tariffs which are applied in many countries;
>
> And since substantial improvement in the economic conditions can be obtained by increased facilities for international trade and commerce;
>
> And in view of the fact that tariffs, though within the sovereign jurisdiction of the separate states, are not a matter of purely domestic interest but greatly influence the trade of the world;
>
> And in view of the fact that some of the causes which have resulted in the increase of tariffs and in other trade barriers since the war have largely disappeared and others are diminishing;
>
> The Conference declares that the time has come to put an end to the increase in tariffs and to move in the opposite direction.

In the matter of internal duties, the Conference felt that "when goods have been legally imported duty-free or when they have discharged the customs duties and accessory customs charges, they must be regarded as duly nationalized and should be entitled after their importation to claim equal treatment with home products."

The World War, among its other disastrous effects upon trade, destroyed to a large extent the system of enlightened commercial treaties which had been developed during preceding decades. The post-war régime was based upon temporary provisions in the treaties of peace and upon very short-term arrangements. The Conference regarded the situation as one necessitating immediate action by governments with a view to concluding treaties as comprehensive and permanent as possible and also with a view to improving and standardizing the methods of treaty-making. The report adds:

> (1) The Conference therefore considers that the mutual grant of unconditional most-favored-nation treatment as regards customs duties and conditions of trading is an essential condition of the free and healthy development of commerce between states, and that it is highly desirable in the interest of stability and security for trade that this treatment should be guaranteed for a sufficient period by means of commercial treaties.
>
> (2) While recognizing that each state must judge in what cases and to what extent this fundamental guarantee should be embodied in any

> particular treaty, the Conference strongly recommends that the scope and form of the most-favored-nation clause should be of the widest and most liberal character and that it should not be weakened or narrowed either by express provisions or by interpretation.

The adoption of a positive attitude in regard to the most-favored-nation clause was largely the result of the aggressive efforts of the American members, who sought in this way to strengthen what at present is the keystone of the arch of American commercial policy and treaties. The principle of equality of trade, of which the most-favored-nation clause is one of the chief methods of attainment, is of the utmost importance in the consideration of national economic independence, not only in the matter of tariff duties upon imports, but in export duties and the various regulations affecting access to supplies of raw materials.

Indirect Means of Protecting National Trade and National Navigation. The Conference did not fail to point out the hidden dangers in artificially stimulating trade through direct or indirect subsidies and, while pointing out the harmful effects of the practice known as "dumping," uttered a word of warning also concerning the "excessive, indirect or vexatious measures" having more far-reaching effect than intended, which importing countries may be tempted to employ in defense against it. Conditions of transport were discussed, and the Conference endorsed and urged universal adherence to a number of existing multilateral conventions, among them that relating to maritime ports.

(5) RESOLUTIONS ON INDUSTRY

The Conference appears to have accomplished its outstanding work in the field of commerce. Regarding the great industrial questions confronting the world there proved to be less unanimity. The resolutions concerning them are less clear-cut and far-reaching. The chief subtopics considered were "rationalization" and "industrial agreements."

"The methods of technique and of organization designed to secure the minimum waste of either effort or material," *i.e.*, rationalization, were recommended as a "principal means of increasing output, improving conditions of labor and reducing costs of production." Care in its application, so as "not to injure the legitimate interests of the workers," was enjoined, and the assistance of governments, public institutions, trade and industrial organizations and public opinion was invoked.[7]

By the term "industrial agreements" the Conference had reference to combinations or understandings among producers, in other words, to the trust or cartel movement, primarily, of course, when operative across international boundary lines. Analysis of the various types of combination was not attempted, nor was the Conference able to reach an agreement

[7] On this subject see the address of Mr. Henry M. Robinson (United States) in the Verbatim Record of the Fifth Plenary Meeting, and Memorandum on Rationalisation in the United States, Document C. E. C. P. 20 (1), by Mr. David F. Houston.

in principle concerning them. It recognized the development and considered it "good or bad according to the spirit which rules the constitution and the operation of the agreements, and in particular according to the measure in which those directing them are actuated by a sense of the general interest." The Conference advised publicity of the terms of the agreements, and suggested that the League of Nations should study the development of international cartels and make available data concerning them.

The American delegation refrained from voting upon statements of the Conference regarding cartels.[8]

Important resolutions relating to industrial statistics were agreed to without difficulty.

(6) RESOLUTIONS ON AGRICULTURE

The Conference was convinced that there existed a general depression among agricultural producers. It adopted resolutions urging that agricultural production should be placed on an equal footing with industry in the matters of standard of living and of normal return to labor and capital. To achieve this end it looked first to agriculturists themselves, and secondarily to national governments. The Conference also held that:

> It is desirable that all hindrances to the free circulation of and trade in agricultural products should be removed, in so far as their removal does not endanger the vital interests of the different countries and their workers.
>
> In those states in which customs protection is maintained, it should be reduced, both for industry and agriculture, to the lowest possible point indispensable to production; care should be taken to assist in the maintenance of an equitable balance between industry and agriculture and not to stifle one to the advantage of the other.
>
> The system of export prohibitions and export duties (with the exception of taxes levied for the benefit of the industry concerned) and frequent changes in customs tariffs, which long experience has shown to be ineffectual and dangerous, should be definitely abandoned.

Other resolutions advocated the increasing utilization of all forms of agricultural coöperation and dealt with agricultural credit, diseases of plants

[8] The Chairman of the American delegation in his report to the President says:

"We recognize that there are certain physical and geographical conditions in particular situations that might make it desirable and economical for some form of international industrial agreements to be made; but we are apprehensive of the dangers of restricted output and the tendency to monopolistic exploitation. The resolution on cartels sets out most of the objections and points out that the success of cartels will be conditional on the character and policies of the management.

"Early experience in the United States in agreements of a similar character resulted in restrictive legislation. Because of this and the conviction that governments would participate in cartels, our delegation felt that we could not by our actions approve international cartels and we took a definite position against international cartels with governmental participation." (The report has been mimeographed for limited distribution by the Department of State.)

and animals, colonial agriculture, forestry and the collection of adequate, comparable, statistical information on a world scale.

Such, in the main,[9] were the findings upon which the 194 members of the International Economic Conference, representing fifty political entities[10] and a number of non-governmental organizations,[11] and advised by 157 experts, were able to agree.[12] In so far as their pronouncements can be reduced to the compass of a single sentence, they found that the world was suffering chiefly from barriers to trade, the fruit of nationalistic aspirations. Such aspirations may be said in general to look toward national economic isolation, commonly denominated "economic independence."

(7) DEFINITION OF ECONOMIC INDEPENDENCE

Speaking without reference to the policies or ambitions of any particular government, it is perhaps possible to approximate a generally acceptable idea as to what a nation may rationally contemplate when it seeks to be economically independent. Such independence may reasonably be considered as based upon *the continuing and unthreatened use of the material things necessary for preserving the national safety and maintaining a gradually rising standard of living for the masses of the people.* If these material things must, in any important part, be imported their use is obviously connected, very intimately, with the maintenance of open channels of international trade, and of markets for the exports necessary to pay for imported merchandise. Doubtless little difference of opinion is possible in respect of the essential character of the preservation of the national safety if a nation is to consider itself in any sense independent. Moreover, in these times when evolution and progress are considered to be merely normal, it will be difficult to deny that a nation, in order to continue in a genuinely real sense independent, must see to it that the present standard of living and general happiness of the masses of the people shall not only be actually but relatively undiminished, hence shall improve at a rate at least fast enough to keep pace with that increase in economic welfare which can confidently be expected in the world at large. Nations which neglect or are unable to accomplish

[9] See *infra*, subdivision (10), for the statement of the Conference bearing directly on the problem of access to raw materials.

[10] Outstanding among the non-participating countries were Argentina, Peru and Spain. The United States, Russia, Turkey, Egypt, and Mexico (the last by observers only, and not counted in reckoning the number of participating states) were represented on an equal footing with states members of the League.

[11] *E.g.*, the International Chamber of Commerce.

[12] Though the members were, with a few exceptions, the appointees of their respective governments, they were not official spokesmen of governmental policy, and they in no way committed their governments. The agreement of the Russian delegation was to only stated ones of the resolutions. The Turkish delegation abstained from voting. See Final Report —Document C. E. I. 44 (1)—pp. 6, 49, 50.

this are assuredly falling behind in the competition among nations and are probably in a way to lose, in whole or in part, the status of politically independent Powers.

(8) NON-EXISTENCE OF INDEPENDENCE IN THE SENSE OF PRACTICABLE ISOLATION

The crux of the problem lies in the precise meaning of the term "independent." Taken literally it would, indeed, seem to connote a situation in which intercourse with other countries may be dispensed with and the prerequisites of independence nevertheless retained. Such literal interpretation appears to be the one generally accepted. Nevertheless, it seems pertinent to inquire whether for economic independence it is really essential that a country in fact possess within the area or jurisdiction of its political control all of the sources of supply and all of the conditions and processes necessary to its safety and to its developing economic life. It is common knowledge that no political unit, or political federation even, existing in the world today produces in sufficient quantities to meet its demands all or nearly all of the raw commodities, and few if any produce all of the varieties of manufactured goods, that enter into the everyday life of a civilized community. The statement of the Economic Conference quoted above is clearly too moderate. Among the commodities just referred to are many which cannot be rated as desirable and useful merely, but as genuinely necessary to modern civilization. We may regard as wholly improbable the potential capacity of any country to effect such production. Of especial significance is the fact that the accepted instruments of national defense are manufactured from materials not all of which are produced within the limits of any one country.

In respect of resources, therefore, it appears that national economic independence, in the sense of national production of economic requirements, though it may have existed in the simple national economies of antiquity, does not now exist, and is not likely to exist again. "During the Great War," says the Final Report of the International Economic Conference, "the nations were driven temporarily to live to a quite abnormal extent on their own resources, but this condition of self-sufficiency—incomplete though it was—was only attained at the cost of hardships which tended rapidly to become almost intolerable" (p. 16). Furthermore, it should be borne in mind that if a country undertakes to produce at home on a large scale articles which can be more cheaply imported, it must risk in the long run bringing about a situation where the standard of living will be lowered. Unless this is consistent with the maintenance of national economic independence, the mere fact that it is physically or technically possible to produce an article within the national area does not mean that it is producible in the economic sense.

(9) INDEPENDENCE ACHIEVABLE ONLY THROUGH INTERNATIONAL AGREEMENTS CONTROLLING NATIONAL ACTION SO AS TO MAKE EACH NATION INDEPENDENT OF THE OTHERS' WILL TO MONOPOLIZE

Is it then possible to achieve a practicable economic independence or its equivalent in the world as now constituted? The practical disadvantage of dependence is the possibility of being deprived of things needed. Correspondingly the practical advantage of independence is an assured supply of such things. The dependence really feared is dependence upon the will of another state in the matter of obtaining the necessaries of economic life. Independence in this respect, then, may reasonably be regarded as independence of the right of other countries to refuse or to cut off supplies.

In the modern world national governments, with great approach to uniformity, abide by their solemn contractual agreements, or treaties. This is particularly true when the promises are clearly expressed, and susceptible of one interpretation only. Here, then, is an opening through which the countries of the world, each denied by nature supplies of certain economic necessaries, may through coöperation with each other achieve the end. Interdependence thus becomes the basis of independence. "In view of the growing realization of the interdependence of nations," said the American delegation to the International Economic Conference, in a statement to the press, the members "are all convinced that methods must be worked out to assure continuous collaboration in the study and solution of economic problems." [13] The development of international law through treaties may, it is believed, be relied upon at some time in the future effectually to assure to all countries access to the sources of the material things they need, as well as equality of opportunity to purchase, pay for, and transport them. The problem of these latter means of obtaining materials is often quite as important as access and often more difficult of solution.

Through trade are obtained the materials of other countries in exchange for surplus supplies of a country's own products. Through industry, whether of the factory or the farm, raw materials are made available for use. Efficiency in such processes may sometimes be increased through international agreements, thus in effect adding to the world's supplies of usable goods. The International Economic Conference, in dealing with barriers to the efficient functioning of trade, industry and agriculture, dealt very closely with the problem of national economic independence. In the light of its report, and even more pointedly in the light of the fact of its convocation, the nationalistic desire not to be dependent upon supplies of goods produced without the limits of political jurisdiction seems the essence of sentimentality.

In conclusion, it now becomes appropriate to consider with some care the practical problem most intimately connected with national economic independence, namely, access to supplies of essential raw materials.

[13] United States Daily, June 24, 1927.

(10) THE RAW MATERIALS PROBLEM

Governmental actions placing obstacles in the way of international trade in raw materials was the subject of interchanges of views between prominent members during the opening plenary sessions of the International Economic Conference. Actual discussions and conclusions, however, proved to be rather limited. The Conference recommended:

> (1) That the exportation of raw materials should not be unduly burdened by export duties or any other taxes and that, even in cases where such duties or taxes are justified by fiscal needs or by exceptional or compelling circumstances, they should be as low as possible;
>
> (2) That, in any case, export duties on raw materials should never be imposed for the special purpose of subjecting foreign countries using such materials to an increased burden which will place them in a position of unfair inferiority as regards the production of the finished article;
>
> (3) That export duties on raw materials, whether levied for revenue purposes or to meet exceptional or compelling circumstances, should never discriminate between different foreign destinations;
>
> (4) That the above principles apply equally to export duties on articles of consumption.[14]

These recommendations appear in the final report of the Conference under the heading "Export Duties" (p. 31). There was no separate section devoted to raw materials. The advice may be pronounced excellent as far as it goes. But few will deny that more far-reaching principles remain to be enunciated and written into international law.

Meantime even a country so greatly favored by nature as the United States must seek, among others, the following essential materials outside its borders: rubber, tin, nickel, mercury, manganese, tungsten, chromium, antimony, magnesite, vanadium, uranium, platinum, diamonds, asbestos, potash, nitrates, shellac, pulpwood, cork, jute, sisal, wool, silk, hides, certain dyestuffs, iodine, quebracho, citric acid, camphor, quinine, various nuts and oils, spices, cocoa, tea, coffee and sugar. How shall the world proceed to a solution?

1. In the first place it would seem that the nations must recognize the necessity of a common understanding that governing principles must be adopted based upon the general proposition that, in the matter of supplies of universally desired products of nature, national possession of limited areas of production should not give exclusive rights to use or control the

[14] In an article entitled "Some Lessons from the Economic Conference" (Foreign Affairs, October, 1927, p. 14), Mr. Henry M. Robinson, Chairman of the American Delegation, says that "the age-old discussions of free trade *versus* protection and of the socialization of national resources were injected into the proceedings." He adds: "These discussions served their purpose, perhaps, in developing the fact that the rationalization of tariff schedules is a problem of more importance than the limiting of tariff levels, and that the socialization of resources is a problem of domestic rather than of international implications." At another place he speaks of the conference having "condemned the practice of artificially limiting the export of raw materials."

output. International law should recognize the compelling interest in, and consequently the rights of other nations to, a fair share of the product.

2. The irreducible minimum which the possessing country should feel obliged to accord to other countries would seem to be complete most-favored-nation treatment. This would imply, as among outside countries, the absence of discriminatory export duties, and of any discrimination in taxes, in the award of concessions, or in the regulations of any variety which affect production. This would obviously leave the way open for excluding outside countries altogether. Its adoption as a rule of international law would not greatly alter the practice of today. Broadly interpreted, however, so as to regard as actually separate nations the component parts of the "British Commonwealth of Nations," it would put a stop to such practices as the levy of irritating and burdensome differential export duties on tin ore in British Malaya.

3. The next step would seem to be the recognition that other countries are entitled as a matter of right to national treatment in the producing area. This would approximate the Open Door. It would place the nationals of outside countries on a plane with those of the producing country in all respects so far as the government of the producing country would be concerned. Presumably, however, it would not prevent the imposition of export duties. Hence, in view of the fact that nationally consumed goods are not exported, an inequality in fact might result. Certainly, if the levy of these duties were allowed to become sufficiently burdensome, the producing country could effectually cut off supplies desired by the outside world. In practice today there are a number of instances of burdensome, though not prohibitive, export duties, but they seem for the time being much less important than existing regulations excluding foreigners from participation in extractive enterprises. National treatment, even confined to its present implications, would probably ameliorate the situation in a definite way.

4. A needed addition to national treatment would be recognition that the producing country cannot levy export duties, except in a reasonable way for revenue, possibly also for conservation, upon shipments of raw materials abroad. When such export duties are levied, equivalent excise duties should be levied upon internal consumption. The recognition of this principle and its adoption as a rule of international law would be a definite step beyond present practice in the direction of a regulated international order governing raw materials.

5. In view of the terms of the so-called Stevenson Plan for rubber restriction, consideration of export duties leads directly to consideration of whether governments should be regarded as within their legitimate rights when they assist their nationals in monopolistic and price-fixing schemes. This is a question that distinctly has two sides. The presumption would always seem to be in favor of allowing the law of supply and demand to take its course, but experience proves that to do so frequently leads to enormous

discrepancies between current production and current consumption, with resulting disturbances of the market, vast losses, inordinate profits and, perhaps, general financial dislocation or disaster. It may with some confidence be said, therefore: (a) that governmental interference is in principle justifiable; (b) that it should not be exercised except in extreme cases of proven danger; (c) that, when exercised in behalf of producers to prevent overproduction and loss, it should be accompanied by stringent regulations limiting prices and calculated to prevent under-production; (d) that there should be willingness to submit to reasonable international supervision. Effective regulations such as these would be exceedingly difficult to obtain, but if, through effort and experience, they should prove to be obtainable, they may offer a possible solution for one of the biggest component parts of the world problem of raw materials.[15]

6. Another peculiarly difficult question arises, or will arise, in the case of raw materials which all desire, and yet which are found not only in limited areas, but in quantities actually insufficient under the most unrestricted production to meet the demands of all countries, or even of the country possessing the producing area. Many believe that petroleum threatens to fall into this class. Helium, a non-inflammable lighter-than-air gas, may already be so classified. Probably few governments now existing would feel disposed in such cases to recognize any international obligation. But it seems inevitable that ultimately, if the world is to advance beyond the stage where national control and national utilization are legally exclusive, international law must dictate a reasonable sharing of such products on the part of the possessing countries with all other interested countries; though doubtless exception would be made in the matter of food or other products immediately necessary to the preservation of life.

7. In other words, progress toward the solution of the raw materials problem would seem to be in the direction of the universally recognized and unrestrained right of access on the part of all peoples to a reasonable share of raw materials necessary to the preservation of national economic welfare, regardless of where such raw materials are produced. But meanwhile even piecemeal rules of international law governing duties, taxes, regulations, concessions, monopolies and price-fixing promise much in the way of betterment of existing conditions. Perhaps the decisive element of the problem will be met when the national governments fully recognize that it is an international one and seek to coöperate in its solution.

When any one country arrives at a policy in respect to raw materials which it is prepared to espouse, the way to realization would seem to lie

[15] If control of production, as in the case of the Stevenson Plan, is made effective through export duties or prohibitions, a discrepancy arises between the conclusions of this and the preceding paragraphs. If the control is justifiable and if the best means of enforcing it is through export duties, doubtless such exception should be admitted. If there is appreciable consumption within the producing area, corresponding measures should be taken to prevent discrimination as between the outside world and the consumers within that area.

through treaties with others with which it finds itself in agreement. Though treaties at the present time are unlikely to go far toward complete solution, each foreign office ought, if possible, to think the problem through to the end and be guided by that end, even if it is in but distant view. A treaty with one outside country, followed by treaties with others, points the way toward a single general convention open to adoption by all countries. Before the nations are ready for definite commitments, however, an international conference for the purpose of discussion and clarification, such as was begun at the recent general Economic Conference, is manifestly desirable.

PROBLEMS OF INTERNATIONAL LAW IN THE MEXICAN CONSTITUTION OF 1917

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Of the Texas Bar

THE MEXICAN LEGISLATION

The differences between the United States and Mexico which have been occasioned by Article XXVII of the Mexican Constitution of 1917 and the regulatory laws designed to give it effect are concerned with such important questions of international law as to warrant a rather extended examination of the principles involved and the contentions of the two parties. This is particularly true in view of the fact that the question has been said to be one upon which there can be no difference of rational opinion, and further that it is not a justiciable one.

The Constitution of 1917 was the result of the revolution of 1910 in Mexico and was substituted for the Constitution of 1857 which had been in effect until that time.[1] The constitutional changes which form the basis of the various protests made by the United States are all contained in Article XXVII which provides, among other things, that the direct ownership (*dominio directo*) of certain enumerated mineral substances, including coal, gas, and petroleum, is vested in the nation and is inalienable and imprescriptible. Provision is made for the development of these resources by means of concessions granted by the government. It is further provided that only Mexicans and Mexican companies may acquire ownership in lands, waters, etc., or obtain concessions to develop the natural resources of the nation. The same right may be granted to foreigners, provided they agree before the Department of Foreign Affairs to be considered as Mexicans in respect to such property or concession, and not to invoke the diplomatic protection of their governments, under penalty of forfeiture. Within a strip one hundred kilometers from the frontiers and fifty kilometers from the seacoast a foreigner may under no conditions acquire direct ownership of lands and waters. Communal lands (*ejidos*) formerly belonging to communities are to be restored to them by means of expropriation, the basis of value of lands so expropriated being fixed at the declared taxable value plus 10 per cent, plus improvements. The payments are to be made by means of bonds issued by the State in which the land is expropriated, the bonds to mature in not less than twenty years and to bear not more than 5 per cent interest. These bonds may not be alienated. Provision is made for the division of large landed estates (*latifundos*), the method of payment being

[1] For an English translation of the Constitution of 1857 see Wheless, Compendium of the Laws of Mexico, 1910, pp. 1–57.

the same as for lands taken for *ejidos*. Laws and regulations designed to carry out the provisions of the constitution in respect to petroleum properties and those concerned with alien land ownership have been promulgated for the purpose of more clearly defining the scope of the articles referred to. It may be noted before passing to these laws that the second paragraph of Article XXVII provides that "private property shall not be expropriated except for reasons of public utility and by means of indemnification." This differs from the same article in the Constitution of 1857 in that it does not require prior payment for the expropriated property.[2]

The Mexican Congress passed in 1925 the law regulating Article XXVII in the branch of petroleum, and in 1926 the President promulgated regulations of the organic law.[3] Those portions of the organic law that affect foreign interests provide in substance that foreigners must comply not only with the mandates of the law before obtaining a concession, but must also enter into the stipulated agreement before the Department of Foreign Affairs. No right in any concession may be transferred to a foreign government, and concessions shall give only the right to reduce the petroleum to possession and to dispose of it. The duration of a concession is fixed at thirty years, with privilege of renewal, provided that all legal requirements have been met. Article 12 provides that concessions previously granted by the Executive shall be confirmed in accordance with the law without cost. Article 14 relates to those rights acquired prior to May 1, 1917, and reads as follows:

> Article 14. The following rights will be confirmed without any cost whatever and by means of concessions granted in conformity with this law:
> I. Those arising from (*que se deriven*) lands in which works of petroleum exploitation were begun prior to May 1, 1917.
> II. Those arising (*que se deriven*) from contracts made before May 1, 1917 by the surface owner or his successors in title for express purposes of exploitation of petroleum. The confirmation of these rights may not be granted for more than fifty years computed in the case of fraction I, from the time the exploitation works began, and in the case of fraction II, from the date upon which the contracts were made. . . .

The next article (Article 15) requires that the application for confirmation of the above rights must be made within one year from the date of promulgation of the organic law; that date having passed, the rights are to be considered as renounced.

The regulations of this organic law detail further the matter of concessions. It is provided that proof of the "works" mentioned in subdivision I of Article 14 shall be made by evidence sufficient in the opinion of the Depart-

[2] Art. XXVII. Wheless, *op. cit.*, p. 8.

[3] Organic Law in *Diario Oficial*, December 31, 1925; Regulations of the Organic Law in *Diario Oficial*, April 8, 1926. They are also contained in the official pamphlet of the Department of Industry, Commerce and Labor, entitled *Ley del Petroleo y su Reglamento*, 1926, Mexico.

ment of Industry, Commerce and Labor. The operations which will be considered in the nature of petroleum exploitation are: first, the drilling of oil wells, and second, such operations of a geological nature as in the opinion of the said department were conducted for such a purpose. As to the contract rights mentioned in subsection II of Article 14, they may be proved by documents of legal validity showing an assignment of rights over the subsoil (a public instrument is here required), or contracts setting out that the purpose was for petroleum exploitation, or for which a sufficient consideration was paid as to make it obvious that the contract was made for such a purpose. The concessions granted by virtue of Article 14 may be extended if the holder has complied with his legal obligations under the law. Contracts made after May 1, 1917, and of the nature outlined above have preference for new concessions.

The portions of Article XXVII dealing with the ownership of land by foreigners have been dealt with in the so-called Alien Land Law and its regulations.[4] A foreigner may not directly acquire ownership of lands within fifty kilometers of the seacoast or within one hundred kilometers of the frontiers, nor may he be interested in a Mexican company owning lands within the zones mentioned. In order that the foreigner may form part of a company owning lands in another part of the country, he must first agree to be considered a Mexican national as to the affairs of the company. If, however, the company is formed to exploit rural agricultural lands a foreigner may not be interested in the company if the effect is to place more than 49 per cent of the stock in foreign hands. Individuals who, prior to the law, represented more than 49 per cent of the stock of such a company are allowed to retain their ownership for life, but if it should after his death go to a person not authorized under the law to continue such ownership, it must be disposed of within five years, subject to extension of time in case of impossibility to make such a disposition. Corporate bodies holding such an interest must dispose of it within ten years. Foreigners holding any of the above rights are required under penalty of forfeiture to make a declaration of their rights within one year.

The regulations of this law are largely administrative in character. Provision is made for companies, even completely foreign, who desire to acquire lands for other than agricultural purposes. Such acquisition is authorized outside the prohibited zones, subject to the statutory declaration before the Department of Foreign Relations. Those foreigners acquiring more than 49 per cent of the stock of a Mexican company for agricultural development after the promulgation of the Constitution, but before that of the regulatory laws, may retain such holding until death. Their heirs, however, if not Mexican citizens, must dispose of the interest within five years. Corporations in like position must dispose of their excess holdings within ten years.

[4] Alien Land Law, *Diario Oficial*, January 21, 1926. Regulations of Alien Land Law, *Diario Oficial*, March 29, 1926.

If the rights possessed by the foreign corporations or Mexican corporation with foreign holders do not come within those mentioned above, they may be retained for the life of the corporation as provided in its charter. Provision is made for cases of impossibility of alienation by heirs within the specified time, extension being within the discretion of the Department of Foreign Affairs. If the sale required is not made in the specified time, proceedings will be taken for the public sale of the property and the proceeds delivered to the account of the proper party. None of the provisions of the law and its regulations shall affect contracts made by the government for the division of large estates. The final article provides that none of the provisions of the law shall be applied retroactively to the prejudice of any person whatsoever.

With respect to the restoration of *ejidos* (communal lands) to the towns, villages, hamlets, etc., the provisional decree of January 6, 1915,[5] is given the force of a constitutional provision. That decree nullified previous "illegal" alienation by the government of lands, waters and forests belonging to villages and communities, restoring title to the villages. For villages having no *ejidos*, or being unable to prove title to those formerly possessed, expropriation of lands necessary for their needs is authorized, compensation being made to the persons having their land thus expropriated. Other portions of the law provided administrative details and for presentation to the courts of the claims of parties injured by the decree. Laws have not yet been passed for the general breaking up of the *haciendas*, or large landed estates.

MUNICIPAL LEGISLATIVE LIMITATIONS ON PRIVATE PROPERTY

From this summary résumé of the Mexican land and petroleum laws it is apparent that they involve a change, more or less radical, in the system of land tenures. In the case of agricultural properties the system fostering large individual holdings is abrogated in favor of one of small holdings by a large number of owners. In the case of petroleum the *dominio directo* of the subsoil is vested in the nation and the prior owners receive in return concessions of exploitation of fifty years' duration. The latter is but the adoption of the ancient theory of double domain as developed by the Glossators.[6] "*Dominium*," said Potanus, "*duplex est, directum et utile.*"[7] To the Mexican state belongs the *dominium directum*, and to the holder of the concession belongs the *dominium utile*, *i.e.*, the right to reduce to possession and enjoy the substance.

Changes in the system of land tenure by legislative intervention are by

[5] In de Negri, *Recopilación Agraria*, 1924, Mexico, p. 34. An English translation is to be found in C. W. Hackett, The Mexican Revolution and the United States, 1910–1926, World Peace Foundation Pamphlet, Vol. IX, No. 5, 1926, pp. 403–405. The pamphlet contains an admirable summary of the correspondence exchanged between the United States and Mexico.

[6] Chenon, *Les Démembrements de la Propriété Foncière en France*, Paris, 1923, pp. 26–32.

[7] *Id.*, p. 30n.

no means a legal novelty. All systems of land tenure and of descent and distribution are directed, consciously or unconsciously, towards the concentration of land in the hands of a few holders, or of diffusing land-ownership over as large a portion of the population as possible. The policy of the state changing, the legislature intervenes to assure effectiveness to the new policy. The breaking up of large landed estates as contemplated by the Mexican Constitution, as well as the constitutions of most of the European succession states, is quite analogous to the abolition of the old feudal tenures in France and in England. In the former state a large part of the work had been done by a long, slow evolution, but was completed by the series of laws and decrees arising out of the French Revolution, beginning with the decree of August 11, 1789.[8] In England the Statute of 12 Chas. II, cap. 24,[9] did away with most of the old feudal tenures, vesting them in the crown. The Irish Land Act of 1870,[10] which was passed to remedy the condition of land tenants in Ireland, interfered to such extent with "property rights" that there was a great protest against it in England. This act was followed by others of similar nature. In New Zealand the system of land tenure has been often changed, particularly as to the extent of the individual's interest in the land.[11] The Land Acts of 1922–1926 in England radically revise land tenure in England, and compensation is provided for only where it appeared to the legislators that there would be a substantial monetary loss to individuals.[12] In none of the other changes mentioned above was there any compensation.

It is worthy of note in passing that a number of the constitutions of the European succession states, including that of Germany, establish the theory of "social use" of property.[13] It is even provided that the legislature may,

[8] *Id.*, p. 99 *et seq.*

[9] This statute was reënacted in New Jersey. Statutes on Conveyances, Sec. 69. All feudal tenures were abolished by statute in Connecticut, New York and Georgia. Stimson, American Statute Law, I, p. 146. Also existing estates-tail have by legislative act been turned into fees. DeMill *v.* Lockwood (1853), Fed. Case No. 3782; existing joint tenancies have been turned into tenancies in common, abrogating right of survivorship, Miller *v.* Miller (1819), 16 Mass. 59; or the property may be sold and proceeds divided, Richardson *v.* Monson (1854), 23 Conn. 94. The scope of changes apt to be attempted by legislative action is usually determined by the proportion of landless population and available land. Thus it would be surprising to find in Canada or the United States the major operations that have recently taken place in the small states of Central Europe. If the modern tendency to accept sociological and economic criteria as influencing judicial decision be admitted, these differences in economic structure must be taken into account in attempting to determine the legal effect of such changes in land tenure.

[10] 33 and 34 Vict. Chap. 46. See also 44 and 45 Vict. Chap. 49.

[11] Hutchison, The "Socialism" of New Zealand, New York, 1916, pp. 3–13, 41–49.

[12] For a brief account of these acts see Sir Leslie Scott, The New Law of Property Act Explained, London, 1925. See also, Holdsworth, "The Reform of the Land Law: An Historical Retrospect," 42 Law Quart. Rev., 158–183.

[13] See esp. Art. 153 of the German Constitution. *Cf.* Art. 99 of the Constitution of Poland. See also Yovanovitch, *Constitution du Royaume des Serbs, Croates et Slovènes*, Paris, 1924,

by so providing in the law, proceed to expropriation for the community good without the necessity of compensation.[14] This is so even though the institution of private property is still retained.[15]

State legal systems impose limitations upon the state and the group for the benefit of the individual and upon the latter for the benefit of the group. The preponderance of one or the other set of limitations is subject normally to gradual evolutionary shifting, and extraordinarily to revolutionary upheavals resulting in violent readjustments. Under normal conditions the balance between the two will reflect changing social and economic conditions as well as changing concepts of political theory. No better example of the normal movement of the two opposing sets of limitations is to be found than in the jurisprudence of the Supreme Court of the United States. In its decisions interpreting the Fourteenth Amendment and the "police power" of the States may be noted gradual loosenings and tightenings of the restrictions on the State or the individual as the case may be, and a continued unwillingness to attempt to crystallize the limits of these restrictions.[16] Many acts of the States interfering with "private rights" have in recent years been permitted, though the same acts fifty years ago would probably have been "unconstitutional." [17] Existing social relations in the United States are such that any violent change in the established system of "property" or "private rights" would be practically impossible. Political and economic conditions outside the United States being quite the opposite, it is not surprising that different conceptions of state interference in economic life are preponderant.

Civil law countries, having no Fourteenth Amendment, have not that same judicial control over legislative interferences with private rights that is found in the United States, though in practical effect the results do not greatly vary. The question of the responsibility of the state to individuals injured by legislative acts has been studied more fully in France, perhaps, than in any other country. Numerous attempts have been made to delimit the field of free interference by the legislature, and to classify in a general

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pp. 320–334; Martna, *L'Esthonie*, pp. 238–40; Harrison, Lithuania, Past and Present, London, 1922, pp. 129–132; Papànek, *La Tchécoslavie (Thèse)*, Paris, 1923, p. 81. Translations of the various new constitutions are to be found in McBain, The New Constitutions of Europe, New York, 1922.

[14] Chap. V., Sec. 109, Constitution of Czechoslovakia.

[15] Péritch, "*Les Dispositions Sociales et Economiques dans la Constitution Yougoslave*," 43 *Revue du Droit Public*, 486–494.

[16] "The power is, and must be from its very nature, incapable of any exact definition or limitation." Slaughter House Cases (1872), 16 Wall. 36, 62. "It is asked . . . Where are we going to draw the line? . . . With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposite sides." Noble State Bank *v.* Haskell (1911), 219 U. S. 104, 112.

[17] *E.g.*, Village of Euclid *v.* Ambler Realty Co. (1926), 47 Sup. Ct. 114. Also 25 Col. Law Rev. 470. See the interesting article by Judge Hough, "Due Process of Law Today," Harv. Law Rev., 1919, 218, especially the closing remarks of page 233. Compare, however, Brown, "Due Process of Law, Police Power and the Supreme Court," 40 Harv. Law Rev., 1927, 943.

fashion the state legislative acts giving rise to a claim for compensation.[18] These attempts to classify laws as *lois véritables* or *normatives* and *lois constructives*,[19] or as general laws and laws directed at particular individuals, are of little or no assistance in determining the question of state responsibility, and have been subjected to considerable criticism as merely clouding the issues.[20] In the final analysis there is no existing legal way in these countries to prevent the legislature from giving or refusing compensation in any case; the only method is the political one of expression at the polls. It must be emphasized here that we are speaking of the exercise of political, legislative power by the state, as distinguished from the exercise of its administrative or corporate functions.[21] It is possible for the courts in civil law countries to widen the field of the state's responsibility by their interpretation of what constitutes an administrative act, for in the field of administrative action they have found no difficulty in attaching responsibility to the state for injuries to individuals. If the court can find or imply some contractual relation between the state and individuals injured in their business by a new law, it is usual to hold the state liable for the damages occasioned by it. The modern tendency is to widen the field of these implied contractual relations and with it the possibilities of state liability.[22]

[18] Teissier, *La Responsabilité de la Puissance Publique*, Paris, 1906; Duguit, *Traité de Droit Constitutionnel*, T. II, p. 210 ff.; Gabba, *Nuove Questioni di Dirritto Civile*, Torino, 1914, II, p. 17 ff.; Barthélemy, "*La Responsabilité Pécuniaire de l'Etat à Raison du Préjudice Causé à une Catégorie de Citoyens par une Réforme Législative*," 24 *Rev. du Droit Pub.* (1907), 92; Jèze, "*De la Responsabilité de l'Etat Italien*," etc., 29 *id.* (1912), 433; Duguit, "*Responsabilité Pouvant Naître à l'Occasion d'une Loi*," 27 *id.* (1910), 637; Marmion, *Etude sur Les Lois d'Ordre Publique en Droit Civil Interne (Thèse)*, Paris, 1924; Nory, *Le Droit de Propriété et l'Intérêt Général (Thése)*, Lille, 1923; Bielsa, *Limitaciones Impuestas a la Propriedad en Interés Pùblico*, Buenos Aires, 1925; Giraud, *De La Responsabilité de l'Etat à Raison des Dommages Naissant de la Loi (Thèse)*, Paris, 1917; Giaquinto, *La Responsibilità degli enti Pubblici*, 2a. ed. 1912, esp. I, 1–38, II, 199–242, III, 1–37; Arlet, *De la Responsibilité de l'Etat Legislateur (Thèse)*, Bordeaux, 1914; Bullrich, *La Responsabilidad del Estado*, Buenos Aires, 1920, esp. Ch. VI and Ch. IX; Agard, *Documents Relatifs à la Question des Indemnités etc. (Thèse)*, Toulouse, 1911; Brulle, *Le Responsabilité de l'Etat à raison des Actes Législatifs (Thèse)*, Bordeaux, 1914; Mayer, *Deutsches Verwaltungsrecht*, 3 auf., München, 1924, II, pp. 118–134; Sourdois, *De l'Evolution, du Fondement et de l'Etendue de la Responsabilité de l'Etat*, Bordeaux, 1908.

[19] Duguit in 27 *Rev. du Droit Pub.* 637; Scelle, "*A Propos de l'Etablissement du Monopole*," etc., 30 *id.* (1913), 637. Equally inconclusive is the attempt to require laws to meet some metaphysical standard such as the "juridical conscience" of the nation. *E.g.*, Lassalle, *System der Erworbenen Rechts*, Leipzig, 1861, p. 211 ff. *Cf.* Gény, *Science et Technique en Droit Privé Positif*, Paris, 1924, IV, 106. Much of the difference of opinion may be reduced to a mere difference of terminology and definition. *Cf.* Arlet, *op. cit.*, 1–10.

[20] Vital, "*Da Responsabilidad do Estado no Exercício da Função Legislativa*," *II Boletim da Faculdade de Dereito da Universidad de Coimbra*, 267–280, 513–527, esp. p. 520 *et seq.* *Cf.* Grivaz, "*La Question des Eglises de Savoie et la Théorie des Droits Acquis*," 4 *Rev. Gén. de Droit Int. Pub.* (1897), 645–680, esp. p. 657 ff.

[21] The distinction is discussed in Borchard, *Diplomatic Protection of Citizens Abroad*, 1915, p. 117, and is criticized in Sourdois, *De l'Evolution, du Fondement et de l'Etendue de la Responsabilité de l'Etat*, etc., Bordeaux, 1908, pp. 119–120. [22] Brulle, *op. cit.*, p. 35 ff.

The practice of states in making compensation for injuries caused by general, impersonal legislative acts has varied.[23] The French tobacco monopoly of 1810 was established without indemnity,[24] and in 1870 France made public the licensed and limited profession of publisher and bookseller in the same manner;[25] yet in 1872 compensation was made as an "act of grace" for the actual physical properties taken over by the establishment of the match monopoly.[26] The Italian[27] and Uruguayan[28] laws of 1912 establishing state monopolies in life insurance made no provision for indemnity, the Italian law expressly negativing such compensation. Switzerland, in the laws establishing a state liquor monopoly[29] and abolishing the absinthe trade,[30] made compensation for the injuries suffered by persons formerly engaged in dealing with those substances. In the United States abolition of the manufacture and sale of spirituous liquors,[31] the abolition of pool halls

[23] It would be futile to attempt to find any logical distinctions between laws in the practice. The French Government paid Fr. 6,000,000 in indemnities when slavery was abolished in the colonies (49 Duvergier, *Collection des Lois*, 1849, p. 144), yet no indemnity was allowed when private telegraphic enterprise was abolished (Duvergier, 1837, p. 109). The law of December 3, 1908, requiring railroads to change their routes provided for compensation (108 Duvergier, 1908, p. 460). *Cf.* the American practice of denying compensation in similar cases. (*E.g.*, New York & New England Ry. *v.* Bristol (1894), 151 U. S. 556; C. B. & Q. Ry. *v.* Nebraska (1896), 170 U. S. 57.) Other examples are too numerous to cite.

[24] *Décrêt* of 29 December, 1810. 17 Duvergier, 1810, p. 254. Likewise the law of 20 July, 1909, abolished the painter's lead industry without compensation. Teissier, *op. cit.*, 16. It may be noted here that several American States have forbidden the sale of cigarettes without compensation. *E.g.* Tennessee, Civil Code, §§ 6798–49.

[25] Teissier, *op. cit.*, p. 17.

[26] Jèze in 29 *Rev. du Droit Pub.* 433, 451. He calls attention to the fact that no *legal* right of indemnity was recognized by the law, and that compensation was made only for the bare physical properties taken. It is interesting to note that the monopoly has recently been placed in the hands of a Swedish-American syndicate.

[27] Audinet, "*Le Monopole des Assurances en Italie*," 20 *Rev. Gén. de Droit Int. Pub.* (1913), p. 5.

[28] Scelle in 30 *Rev. du Droit Pub.* 637.

[29] Laws of Oct. 25, 1885, and Dec. 23, 1886. *Cf.* State *ex rel.* George *v.* Aiken (1894), 42 So. Car. 222, 20 S. E. 221.

[30] The compensation was partial only, and "*par mesure d'équite.*" Federal law of 24 June, 1910. See 40 *Ann. de Lég. Etrangère*, 359.

[31] Mugler *v.* Kansas (1887), 123 U. S. 623. Reference was made by the Mexican Minister to the United States prohibition measures. Note of February 12, 1926. In reply, Secretary Kellogg stated that the law was not in point since the liquor trade was not a "property right," but an "activity subject to license," and "also subject to police powers." Note of March 27, 1926. A recent Kansas statute required farm produce commissioners to procure licenses. Payne *v.* Kansas (1918), 248 U. S. 112. Under the theory mentioned, their business would now be subject to repression, though not before. States would merely have to license a business first; then destroy it. The matter of "license" would not explain the suppression of the manufacture of oleomargerine without compensation. Powell *v.* Pennsylvania (1887), 127 U. S. 678. In Continental legal systems, the fact that an occupation is "licensed" makes it easier for courts to hold the state responsible for an interference with it. Brulle, *op. cit.*, p. 35 ff. The real explanation is that it was subject to "police powers," and to argue that it is not in point here is to argue that the Mexican laws are not exercises of the police power.

in many States,[32] the abolition of lotteries,[33] and numerous legislative acts virtually destroying former legal property interests have been accomplished without compensation. Many of these acts involve the suppression of an industry or business for the public welfare. As to this type of legislative act there is a rather general agreement that the state is not required to make compensation. The apparent lack of "unjust enrichment" of the state is invoked to support the opinion.[34] Opinion and practice differ so widely as to those acts not involving the suppression of an industry that it would be unwise to attempt to draw conclusions concerning them.

Other legislative acts destroying property values in the United States might be mentioned here, many of which deal with the preservation of natural resources of the state. For instance, plants for the manufacture of carbon black from natural gas have had their value reduced to junk by State laws prohibiting their use.[35] Laws have denied the right of the surface owner to extract carbonic acid gas from waters beneath his lands.[36] Banks have been forced to contribute to common funds for the aid of rivals in business.[37] Railroads are forced to contribute 50 per cent of their earning above a fixed rate to a fund for the benefit of less successful rivals.[38] Many of the health measures which are destructive of property are such that reasonable minds might differ as to their necessity.[39] The fact that certain zoning ordinances reduced the value of property belonging to certain individuals 70 per cent was not considered to render the law unconstitutional.[40]

[32] Murphy *v.* California (1912), 225 U. S. 623. See especially the language of Lamar, J., on pp. 628–29, to the effect that property may be taken even in *anticipation* of an "evil."

[33] State *v.* Dobard (1893), 45 La. Ann. 1412; 14 So. 253.

[34] Jèze in 29 *Rev. du Droit Pub.* 433, 446. It is submitted that the distinction is not a sound one. The suppression of an injurious industry can as well inure to the financial as well as physical benefit of the public as the taking over of an industry to be run by the state for profit. In the latter case the operation may be a burden on the public financially because of faulty operation by the state. (*E.g.*, State owned railways in France.) See a note by Haurion in Sirey, *Receuil Gén.* (1923), Pt. 3, p. 41.

[35] Walls *v.* Midland Carbon Co. (1920), 254 U. S. 300.

[36] Linsley *v.* Natural Carbonic Gas Co. (1911), 220 U. S. 61.

[37] Noble State Bank *v.* Haskell (1911), 219 U. S. 104.

[38] Dayton, Goose-Creek Ry. Co. *v.* United States (1924), 263 U. S. 465. This, and the case cited in note 37, *supra*, are authority for the proposition that the state *can* constitutionally "take the property of one man and give it to another."

[39] *E.g.*, Hadacheck *v.* Los Angeles (1915), 239 U. S. 394 (prohibiting use of property for manufacture of bricks from the soil); Reinman *v.* Little Rock (1914), 237 U. S. 171 (prohibiting livery stables within certain districts, including those already established); Powell *v.* Pennsylvania (1887), 127 U. S. 678 (prohibiting manufacture or sale of oleomargerine, including that already manufactured); Smith *v.* Wayne Probate Judge (1925), 231 Mich. 409, 204 N. W. 140 (sterilization of defectives for eugenic purposes).

[40] Village of Euclid *v.* Ambler Realty Co. (1926), 47 Sup. Ct. 114. The court assumed that the plaintiff's computation of loss was correct for purposes of decision. A large number of cases involving destruction of and interference with property interests in the United States are collected by Judge Swayze in 26 Harv. Law Rev. 1. An unusual case is that of Louisville & Nashville Ry. Co. *v.* Mottley (1911), 219 U. S. 467, where an individual had accepted

This introductory consideration of the municipal responsibility of the state for general legislative acts is intended to show the complexity of the general problem of state responsibility, and to point out the variations in practice which render worse than useless the attempt to impose any one system of law as the standard for international comparison. Modern state constitutions may verbally consecrate the absoluteness of "property" rights; yet in no country is the constitutional protection of private property "pressed to its grammatical extreme." [41] We may state the municipal practice as follows: the state may interfere, in furtherance of the common good, with property rights of individuals without compensation, and the degree of interference permissible without compensation varies with the different states.

THE INTERNATIONAL RESPONSIBILITY

In considering the question of international responsibility of states for legislative action involving injury to individuals, it is first necessary to determine whether or not there exists any rule of international law with respect to the private property of aliens. The matter is not considered by the majority of the text-writers except in connection with the conduct of war. Some doubt might be cast upon that rule by reason of the practices indulged in during and after the World War, yet there is almost complete unanimity among the writers to the effect that private property of aliens resident in a belligerent country is inviolable.[42] This principle was included in the Hague Conventions of 1907, and whatever may be the facts with respect to private enemy property disposed of during and after the World War, all the nations involved continue to pay lip-service to the principle.[43]

The same rule is applied in the case of annexation by conquest or by purchase—the property of individuals is unaffected by the change in sovereignty.[44] This rule has been uniformly applied in practice, save for occa-

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a free pass for life as settlement for claim for personal injuries. It was held that the Interstate Commerce Act prohibiting free passes was applicable to this pass also.

[41] Holmes, J., in Tyson & Bro. *v.* Banton (1926), 47 Sup. Ct. 426, 433.

[42] Dana's Wheaton (8th ed.), p. 378 *et seq.;* Fauchille, *Traité de Droit Int. Pub.* (8e ed.), II, Ch. VI; Hall, International Law (7th ed.), Ch. III; Oppenheim, International Law (3d ed.), II, pp. 157–158; Moore, International Law and Some Current Illusions, pp. 5, 13–25; Latifi, Effects of War on Private Property, London, 1907; Fiore, International Law Codified (Borchard's trans.), p. 293, etc.

[43] *E.g.*, the recent speech of President Coolidge: "It has been the policy of America to hold that private property should not be confiscated in time of war. This principle we have scrupulously observed." N. Y. Times, December 8, 1926, p. 14. *Cf.*, however, United States *v.* Chemical Foundation, Inc. (1926), 272 U. S. 1. England also denies that it is confiscation, but see the Special Report of the Committee, etc., Great Britain, Board of Trade, London, His Majesty's Stat. Off., 1924.

[44] Moore, Digest of International Law, I, Sec. 95. Sayre, "Change of Sovereignty and Private Ownership of Land," 12 Amer. Journ. Int. Law, 475.

sional lapses, such as in the case of Alvarez y Sanchez *v.* United States.[45] Certain it is that in 1914 there existed a well-established rule of positive international law protecting the private property of alien individuals on land outside the zone of military operations, and that there existed a rule protecting the property interests of individuals in case of cession by purchase or conquest. These two rules, the existence of which is not questioned, taken with the fact that the institution of private property is still one of the principal bases of the social institutions of the Western world, necessarily involve the existence of a rule of positive international law protecting the private property of individual aliens in time of peace. It is probable that text-writers have given little attention to the status of the private property of aliens in time of peace because the inviolability of such property was so generally recognized. Even the newer constitutions of Europe, with their theories of the "social use" of property, still retain private ownership of property as a basic institution. Only Russia has abolished it. There is, therefore, no sustained practice of states which would make the rule questionable. On the other hand, the rule is to be considered only in conjunction with the opposing one of the right of the state to legislate upon internal matters, and to control property within its borders.[46] This is but a projection on the international screen of the municipal conflict between the interests of the individual and those of the group. Fiore, one of the few writers who deals with the status of the private property of aliens in time of peace, recognizes these conflicting interests in his statements that

> Every state is bound to recognize that the property of private persons, whether civilians or foreigners, is inviolate. No state may deprive a foreigner of his property or compel him to part with it against his will, nor subject him to vexatious measures as a condition of the enjoyment of his rights over his property.[47]

yet

> Legislative jurisdiction must be recognized on the part of the territorial sovereignty in the following respects:
>
> (a) To exclude every real relation between persons and things on the national territory, if that relation cannot subsist without prejudice to the territorial public law or the rules of public policy.[48]

These generalizations are doubtless too broad and go beyond what has been established by international practice. Yet they serve as general statements

[45] (1910), 216 U. S. 167. See Bordwell, "Purchasable Offices in Ceded Territory," 3 Amer. Journ. Int. Law, 119. Chile's attempt in 1886 to apply its legislation as to private rights in conquered territory was not successful. Moore, Digest, I, p. 421.

[46] Fauchille, *op. cit.*, I, Sec. 261; Moore, Digest, II, Sec. 75. In exercising this right, the state always proceeds at its own peril, and an exercise of it contrary to positive international law entrains international responsibility. *Cf.* Hyde, International Law, I, 352. See also Lippman, "Vested Rights and Nationalism in Latin America," Foreign Affairs, April, 1927, p. 353, who clearly sees the basic issues involved.

[47] Fiore, *op. cit.*, Sec. 1165, but *cf.* Sec. 1166.

[48] *Ibid.*, Sec. 1163.

of the principles involved. We have seen that in the principal systems of municipal law the state may, under its police power, interfere with private property without compensation, but that the question of the proper application of the power and of its limits meets widely varying answers. Internationally the question is even more difficult of solution because of the probability of conflict between the legal systems of the contending parties.

International precedents on the matter are rare, and in most cases not completely satisfactory. An undisputed type of case is where a state through governmental agencies appropriates outright the property of a single alien individual or group of individuals without compensation. In such a case, the offending state has uniformly been held responsible. Thus, when the Greek Government deprived Mr. Finlay, a British subject, of a piece of land desired by King Otho for his garden, the British Government successfully pressed a claim against Greece for compensation to Mr. Finlay.[49] In 1853 the United States obtained compensation from the same government for a similar act against the property of Mr. King. In the latter case, the intervention of the United States seems to have been for the purpose of stimulating the Greek Government to prompt payment, since it did not appear that Greece denied liability.[50] The well-known Delagoa Bay Railway Case,[51] involving the Governments of the United States and Great Britain against Portugal, was concerned with the confiscation by the Portuguese Government of a railway concession owned by an American citizen who later disposed of his rights to a British corporation. Portugal denied liability on the ground that the revocation of the concession was a public action for reasons of state which did not entail responsibility of the state.[52] The matter was submitted to arbitration, with the result that Portugal was forced to pay about fifteen and one-half millions of francs to the interested parties.[53] It is noteworthy that in this case a large amount of money had

[49] 39 State Papers (1849–50), pp. 410–482, 906. A similar case arose from the taking of certain property belonging to Mr. Charlton, the British Consul, by the Hawaiian Government. There was a judicial proceeding, but considerable evidence of political interference with the court. Great Britain, 31 State Papers, 1025, 1032. On the Finlay case, see the criticism of Baty, International Law, New York, 1909, p. 85.

[50] Moore, Digest, VI, p. 262.

[51] Moore, Int. Arbitrations, II, p. 1870.

[52] Meili, *Consultation Redigée à la Demande du Gouvernement Portugais*, Zürich, 1892, pp. 25–38.

[53] *Sentence Finale du Tribunal Arbitral du Delagoa*, Berne, 1900, p. 191. It was said in reply to the contention noted above that "*Que l'on veuille, en effet, taxer l'acte gouvernemental de mesure arbitraire et spoliatrice ou d'acte souverain dicté par la raison d'Etat à laquelle toute concession de chemin de fer demeurerait subordonnée, voire même qu'on considère le cas actuel comme un cas d'expropriation légale, toujours est-il que cet acte a eu pour effet de déposséder des particuliers de leurs droits et privilèges d'ordre privé à eux conférés par la concession et que, à défaut de dispositions légales contraires—dont l'existence n'a pas été alléguée dans l'espèce—l'Etat, auteur d'une telle dépossession, est tenu à la réparation intégrale du préjudice par lui causé.*" p. 166.

been already expended in the construction of the railway when the confiscation took place, so that there was an actual taking of physical property. A somewhat similar case arose out of the expropriation by the Turkish Government of certain wharves in Turkey owned by a French company. The action was inspired by political motives and was intended to aid in the establishment of internal order. Delcassé, on the part of France, demanded that the French company at least be given the concession to operate the wharves, which was granted. Disorders took place on the wharves to such an extent as to seriously cripple the operations of the company; with the result that France demanded a complete return of the properties, and finally intervened by force to make good her demands.[54] This case would seem to be nothing more than that of one nation imposing its demands upon another by superior force. The expropriation was made upon grounds of public necessity, and compensation was offered by the Turkish Government, the amount of which was not the subject of protest.

The famous Pious Fund Cases, finally settled by arbitration at The Hague in 1902, involved the attempt by Mexico to retain funds properly belonging to individuals in Upper California, and resulted in a judgment against Mexico for a very considerable sum of money.[55] Perhaps the most extraordinary case of this type was that where American citizens had attempted to purchase property in Haiti, in violation of existing laws of that state forbidding foreigners to own land there, and were subsequently dispossessed by the Haitian Government. Relying on the opinion of Francis Wharton that since no legal proceedings had been taken to dispossess them, they, therefore, had a certain interest in the property—defeasible to be sure, but only so by proper judicial proceedings—the Government of the United States was able to enforce a claim of $17,500 against the Haitian Government.[56] This would appear to be a rather substantial value for an interest acquired illegally and admittedly defeasible. Numerous other cases might be cited, but these are sufficient to establish the liability of the state for arbitrary appropriation of the private property of individual aliens. In this type of case the act is usually done by some other organ of the government than the legislature, so that the state's legislative power does not come into question.

We are afforded a few international cases dealing with an act of legislation operating to the injury of individual aliens. The earliest recorded precedent is that of the Sicilian sulphur monopoly.[57] A contract was made in 1836 between the Sicilian Government and a French company granting to the latter the exclusive right of purchasing and exporting all sulphur produced in

[54] *Archives Diplomatiques*, 1901–1902, pp. 74–90.
[55] Scott, The Hague Court Reports, p. 1.
[56] U. S. Foreign Relations, 1885, pp. 525–26.
[57] Great Britain, State Papers, Vol. 28, pp. 1163–1242; Vol. 29, pp. 175–204, 1225; Vol. 30, p. 119.

the country. The rights of a large number of British subjects were involved, and a prompt protest was registered on the part of the British Government, contending principally that the monopoly was in violation of Britain's treaty rights. Sicily, nevertheless, put the monopoly into effect, with the result that British gunboats were despatched to the vicinity before an agreement was reached. The monopoly was abolished and a claims commission established for the reimbursement of British citizens who had been injured during the short life of the monopoly. Sicily defended the action on the ground that the law was a general one applying to citizens and foreigners alike, and that, therefore, there was no just cause for complaint.[58] There is some support for this position, which will be examined later. Palmerston's insistence that by the very nature of the case compensation could be made only by restitution of the former rights is also worthy of note.[59]

Following the revolution of 1910 in Portugal all religious properties within the state were confiscated, including those belonging to foreigners.[60] This case was submitted to arbitration, with Portugal accepting the principle of liability. The *Observations Générales* submitted by the British Government contained the assertion that

> It is part of the generally recognized principles of international law that foreigners are subject to the laws of police and security of the state upon the territory of which they find themselves, and that the laws of that state also govern the rights of immovable property which they acquire there. In return for this subjection, foreigners are entitled to count upon the legal protection and guarantees under the cover of which they came into the country and acquired their rights.[61]

The same sort of observations were put forward by the other governments involved and formally acquiesced in by Portugal.[62] The case is important in view of the fact that four nations—Great Britain, France, Spain and Portugal—agreed upon the principles above stated. It might here be remarked that during the Italian operations against Rome in 1870 there was some apprehension among other nations that church property belonging to their nationals might be confiscated. England received a promise, however, that the property of foreigners would not be confiscated.[63] Subsequently certain decrees sanctioning the enfranchisement of church properties were promulgated without excepting foreign interests. Numerous complaints

[58] Count Ludolf to Viscount Palmerston, Sept. 17, 1838, 28 State Papers, 1214.

[59] *Ibid.*, p. 1222. This seems also to be the position of the American oil companies with respect to the Mexican petroleum laws. The validity of the argument must depend, however, upon the proof of an actual loss. The monetary loss in the Sicilian case was proved, but in the Mexican case the existence of an actual loss is one of the debatable issues. *Cf.* Giraud, *op. cit.*, pp. 174 ff.

[60] The Hague Court Reports, Pamphlet of Carnegie Endowment for Int. Peace, No. 37. Washington, 1921. France confiscated and nationalized all ecclesiastical properties by the decree of 24 November, 1789, no indemnity being paid. Giraud, *op. cit.*, 244.

[61] Fachiri, "Expropriation and International Law," British Yearbook of Int. Law (1925), pp. 159, 168. [62] *Id.*, p. 169. [63] Great Britain, 62 State Papers, 459, 465–71, 472.

were received by the British Government because of the considerable loss incurred by virtue of the decrees, but an opinion of the Advocate-General held the decrees to be compatible with the promise given by the Italians, and the matter was dropped.[64] The two cases aptly illustrate the difference between acts resulting in complete loss of private property and those resulting only in injury or partial loss, the latter being at least compatible with the "respect of property rights." Whether a particular act is "confiscation" or not is largely a question of degree.

In the years 1911–13, considerable discussion was aroused by the two laws purporting to create a monopoly of life insurance in the state. One of the laws was passed by Uruguay [65] and the other by Italy,[66] both being quite similar in their provisions. The Italian law expressly provided that no compensation should be paid either to nationals or to foreigners for any injury occasioned by the law. There was no express provision in the Uruguayan law, but it was understood at the time that no compensation could be paid unless authorized by the act. Protests were sent to Italy by the Governments of France, Great Britain, the United States, Austria-Hungary and Germany. Some modifications were made in the bill after the protests of the governments whose nationals were engaged in the business of life insurance in Italy.[67] One of the amendments authorized foreign corporations to continue in business for a period of ten years, though this amendment was accompanied by rather onerous conditions dealing with the disposition of the earnings of the companies.[68] Among other provisions, the companies were required to invest a large percentage of the premiums received in Italian Government securities.[69] Legal opinions were divided at the time, some denying the liability of Italy;[70] others denying legal liability, but maintaining equitable liability; [71] while still others were of the opinion that Italy was legally liable under international law.[72] In this latter class, there were reservations as to whether or not the Italian law actually resulted in any considerable confiscation.[73] These differences in opinion were not due to

[64] Great Britain, 62 State Paper, pp. 496–500, 534.

[65] On the Uruguay law see Scelle, "*A Propos de l'Etablissement du Monopole des Assurances en Uruguay*," 30 *Rev. du Droit Pub.* (1913), 637.

[66] Text of the law is to be found in the article by Audinet in 20 *Rev. du Droit Int. Pub.* (1913), p. 5n.

[67] *Id.*, p. 8. [68] Jèze in 29 *Rev. du Droit Pub.* 436. [69] *Id.* [70] Jèze, article cited.

[71] Wehberg, *Das Völkerrecht und das Italienische Staatsversicherungsmonopol*, Wien, 1912.

[72] Rolin, "*Les Droits des Sociétés Etrangères*," 14 *Rev. de Droit Int.* (1912), 82, summarizing Clunet's *Consultation Pour les Sociétés Etrangères d'Assurances sur la Vie Etablies en Italie*, Paris, 1912. Audinet, article cited.

[73] No physical property was taken, so that there was no way of ascertaining with any degree of certainty the amount of damages to follow. The largest value was perhaps what is designated in the United States as "good-will." This type of value is in the United States usually not compensated for in cases involving eminent domain. 35 Yale Law Journ. 234. On the Italian question see Verdross, "*Zur Konfiscation Ausländischen Privateigentums nach Friedensvölkerrecht*," 4 *Zeit. für Off. Recht* (1925), p. 320, 333 note 3.

any failure on the part of any to accept in principle the rule of international law protecting private property of aliens. The disagreement was the same which so often divides the United States Supreme Court, the questions being "How far may the state go in depriving the individual of what previously has been considered to be private property?" "Where does the 'police power' stop and 'eminent domain' begin?" "How great must be a public need to overcome a private 'right'?"

The similar law proposed by Uruguay brought about the same complaints, which were effective in persuading Uruguay not to pass the objectionable measures.[74] The fact that Italy did put into effect the law objected to, and that Uruguay did not, may be another case of a sufficiently powerful nation breaching with impunity a rule of international law, and a weaker nation being forced to observe it. However that may be, the complaints of other nations resulted in the removal by Italy of some of the most objectionable features of the law as first proposed. Further, there seems to have been a reasonable doubt as to whether or not the law would operate to cause any great loss to the foreign companies. These cases, therefore, must be regarded as indecisive.

A less well-known case is that of Henry Savage, who in 1851 imported a quantity of powder into Salvador. In 1852 the government created a monopoly in the commerce of that product. The powder of Savage was seized without any opportunity being given him to dispose of it. An arbitration resulted in a substantial award to him, but the decision has never been published. From a meagre report of the case it appears that there was a complete confiscation, without the opportunity of any disposition of the property being given.[75]

It may be remembered also that in 1918, when Russia established the Communist régime, Ambassador Francis sent a communication to the Soviet Government protesting against the wholesale confiscation of private property belonging to foreigners as being against the rules of international law. He was joined in the note by the ambassadors of all the other countries represented in Russia, each reserving on behalf of his government the right to interpose claims for damages done to their respective nationals by the confiscation of property.[76] The appropriation here was complete, no opportunity being given for a prior disposition of the property. The gesture is indicative of the complete acceptance of the general principle of the inviolability of private property of aliens, yet it will be recalled that at the conference of the Allied Powers at the Hague in 1922 with respect to Russian affairs the only demand made on Russia was that the concessions for the use of property previously owned by individuals be granted to the former owners. The failure of Russia to accept this demand led to the break in relations.[77]

[74] Rolin in 14 *Rev. de Droit Int.* 82, 86.
[75] Moore, Int. Arbitrations, II, p. 1855.
[76] 45 Clunet, 983.
[77] Papers Relating to the Hague Conference, June–July, 1922, H. M. Stat. Off. 1922.

Since the promulgation of the Mexican Constitution of 1917, Rumania has adopted a similar one nationalizing the subsoil.[78] The Rumanian Constitution of 1923 is in some respects harsher than that of Mexico—acquired rights are respected only as a matter of equity and those rights have to be established before a court, which decided whether or not the fifty year concession provided for by the Constitution shall be given.[79] The law applies to nationals and foreigners alike, but it is understood that a *modus vivendi* has been established between the foreign companies there operating and the Rumanian Government.

The cases above noted represent several different fact situations, and while none of them deny the general principle that private property is entitled to protection from the state, the different types of impairment of the private rights of the individual entail a consideration of the complementary rules of law governing the right of the state to protect its own interests. We speak of it usually as the protection of the public interests under the police power, which necessarily curtails to some extent private rights. That states possess such a power is admitted by all writers and has been sanctioned by long standing practice of nations, yet there is no agreement on the limits of this right, and perhaps none is possible.[80] In practice it has often been employed by nations to excuse acts so serious and violent that no one would doubt them to be breaches of international law. This is perhaps unavoidable so long as it is possible for states unilaterally to determine the extent of their "sovereign" rights under international law.

Returning to the different types of cases which have been considered, we may first dispose of the arbitrary appropriation by the state of the property of an alien without compensation, such as the King case and the Finlay case. Under such conditions the right of the state to whom the injured parties owe allegiance to demand reparation is clear and seems generally to have been admitted by offending governments. Another class of case involves the taking of property from one individual or class of individuals and giving it to another individual or class by operation of law. Such a case was the Sicilian sulphur monopoly. There, the element of confiscation was plainly visible, though indirect; the safety of the state was not involved; and finally, the law operated to perform a virtual transfer of property rights from a class of individuals to another. The case differs from a last classification in that the monopoly in question is created in favor of a private individual.

The last classification embraces those cases where the general legislative

[78] Mitrany, "The New Rumanian Constitution," 6 Journ. of Comp. Leg. (N. S. 1924), 110.

[79] Gane, *Nationalization du Sous-sol*, Paris, 1924, pp. 73–74. The Mining Law of July 4, 1924, requires that foreign corporations having acquired interests in Rumanian petroleum must within ten years change the company to a Rumanian one, of which the president and a majority of the board of directors, as well as 55 per cent of stockholders, must be Rumanian nationals. (Art. 33) Rommenhoeller, *La Grande-Roumanie*, La Haye, 1926, pp. 444–464.

[80] Oppenheim, *op. cit.*, I, 214–21; Fauchille, *op. cit.*, I, pp. 410–427, and authorities there cited. *Cf.* Westlake, International Law, Cambridge, 1904, I, p. 296.

action of a country applicable to all alike within its territorial limits, citizen and foreigner, operates to cause injury to, or extinction of, private property.[81] It is only in this type of case that we are confronted with the claims of "sovereignty," and of the state's right to adopt measures necessary for the safety and well-being of its people. The limits placed upon these rights depend primarily upon the existence of two principles of international law; first, that there is a certain international standard of conduct or "due process of law" [82] to which nations are bound to conform; and second, that this standard applies to the treatment by the state of private property belonging to aliens, irrespective of the state's treatment of property belonging to its own citizens. That there is a standard of international conduct to which nations are bound by law to conform is so well established in theory and in practice that it would be difficult to sustain a denial of such a standard.[83] It is not a clearly defined one, to be sure, but nonetheless a real one. In municipal law the standard of conduct which binds a constitutional state towards its citizens is nowhere inflexibly and immutably determined, yet one would not on that account deny its existence. It is sometimes said that the international standard with respect to the treatment of aliens is satisfied in all cases where they receive the same treatment as nationals.[84] This seemingly plausible statement may in effect deny the international standard. If we admit that receiving a state into the family of nations implies an irrevocable admission that any standard which it is able to impose upon its own citizens may also be properly imposed upon foreigners, there is no room for the international standard to function. That the treatment of aliens in the same manner as nationals is not necessarily sufficient to meet the demands of international law has been established by the practice of nations and the decisions of arbitral tribunals.[85] No Western nation has yet accepted the confiscation of the property of its nationals by Russia, and it would scarcely be supposed, for example, that the nationalization of women, if ever practiced, would be accepted as applicable to aliens. If aliens always had to accept the local law without challenge, in neither case mentioned would

[81] On the point see Feilchenfeldt, "Foreign Corporations in International Public Law," 8 Journ. Comp. Leg. (1926), 81, 102–103. He suggests that the status of international law on the matter is so uncertain that treaties are advisable to assure the position of foreign corporations with respect to municipal law. *Id.*, 272.

[82] The phrase is used in this sense by Borchard in the New Republic, April 13, 1927, p. 214.

[83] As to this standard, or minimum limit, with respect to the legal position of aliens, see Borchard, *op. cit.*, p. 39; and as to their property in particular, Westlake, Collected Papers on International Law, Cambridge, 1914, pp. 9–10; Pillet, *Principes de Droit International Privé*, Paris, 1903, p. 171. See also the Declaration of Cannes, 1922, note 88, *infra*.

[84] *E.g.*, Pradier-Fodéré, *Traité de Droit Int.*, I, 340.

[85] Borchard, *op. cit.*, pp. 104–107. Recent decisions of the United States-Mexico Claims Commission establish the ineffectiveness of "national" treatment as a legal bar to recovery for denial of justice. Roberts *v.* Mexico (Docket No. 185); Garcia *v.* United States (Docket No. 292). For the opposite view, see Strupp, *Das Völkerrechtliche Delikt*, Berlin, 1920, 118–120, esp. p. 118, note 3.

other nations have legitimate cause for complaint. In effect, the evidence sustaining the existence of an international standard as necessarily prevailing over the municipal standard is so preponderant that it will be assumed as established for the purposes of this paper.[86]

INTERNATIONAL "DUE PROCESS OF LAW" AS TO PROPERTY

Assuming, then, the existence of an international "due process of law," what is its effect on the treatment of private property of aliens? The cases previously discussed establish the fact that arbitrary taking of property without compensation does not meet the standard, and that when property is taken under the power of "eminent domain" compensation must be made therefor.[87] So also, the transfer of rights from one individual to another, as distinguished from the transfer of those rights from the individual to the state. In the field of general, impersonal legislation the standard becomes obscure. There is, however, sufficient precedent for prediction as to the extreme limits of such acts. Thus a complete overthrow of the institution of private property enuring to the benefit of the state, or a complete taking by the state, for its own use, of the property of one of certain individuals would probably be held by an international court to be contrary to international law.[88] At the other extreme, but just as effective a deprivation of property, is the *suppression* of private industry for the public weal. This

[86] It is possible that a law seemingly applicable to nationals and foreigners alike might be actually directed at foreigners; *e.g.*, the nationalization of an industry in which no nationals were engaged. If the intent to interfere with foreigners as such could be proved, it would no doubt greatly influence an international court. It appears from the official Mexican reports that in 1923 only 1.1 per cent of the total capital invested in petroleum enterprises in Mexico was Mexican. (Mexican Year Book, Los Angeles, 1920–21, p. 303.) When the Italian insurance monopoly was put into force the majority of insurance business in the country was done by foreign companies. (Audinet, article cited, p. 9.) The debates preceding the Rumanian Constitution of 1923 make it appear that Art. 19 was intended not so much as a social measure as an attempt to safeguard the national interests against the operations of foreign oil companies. (Gane, *op. cit.*, pp. 94–101.) Of course it would first have to be proved that some actual injury resulted to the foreign companies or individuals. That issue in the Mexican case would have to be decided before the question of whether or not the act was directed at aliens as such would be considered.

[87] Care must be taken to distinguish between the power of eminent domain and the police power. While they tend to overlap, they are in all modern legal systems treated separately. The terms are simply convenient shorthand used to denote governmental acts injuring private property, the former implying that compensation must be paid, the latter implying that none is necessary.

[88] To this effect was the Declaration of Cannes made by the Allied Powers in 1922 and aimed particularly at Russia. Fauchille, *Traité de Droit Int. Pub.* (8e éd., 1922), I, 436n. It is not supposed that this declaration created international law, but it may serve as an indication of it as understood by the signatory Powers. In form, it was in the nature of a *voeu*. See the discussion of Decencière-Ferrandière, *La Responsabilité International des Etats* (*Thèse*), Paris, 1925, p. 92. The establishment of a state monopoly in a certain field, or of state ownership and private operation in a single industry, are far different from a complete abolition of the system of private property.

would probably be held by the same court to be within the proper limits of international law. The tendency would be to label the act "police power," though the owner would label it "confiscation." [89] The suppression of the liquor traffic in America, as well as the abolition of the institution of slavery, caused large monetary losses to foreigners, yet no government lodged any protest on behalf of its citizens thus injured.[90]

Between the two extremes there is a vast field of action by the state upon which there is as yet no sufficient precedent authorizing more than a cautious statement of probabilities. Each case must be settled on its peculiar facts; upon a weighing of all the factors involved in the light of history, precedent and the *mores*, and an attempt equitably to reconcile the conflicting interests of aliens and of the state legislating with regard to property and persons within its borders. In democratic governments there is a healthy tendency to social experiments, and each state must be admitted to have a large measure of freedom in its attempts to make articulate the needs and demands of its people. On the other hand, the methods employed by the state to achieve its legitimate ends must not be chosen in defiance of the state's international obligations. Sudden and violent changes in the social order have never been accomplished without great cost to the nation involved, either in money or in loss of life. Gradual changes may be accomplished without substantial injustice, while the radical change usually results in the opposite. Even the gradual change is often resisted by individuals or the group, as the case may be, for every such change interferes more or less with existing possessions. In each case, both nationally and internationally, the amount or degree of "confiscation" will have great influence upon the legality of the seizure. To paraphrase the language of the United States Supreme Court: taking just enough property is an exercise of the "police power" and compensation is not required, but taking too much is an exercise of the power of

[89] Attention must be called to the fact that the epithet "confiscation" is but a loosely relative term. To the private owner, the governmental act interfering with his property is always "confiscatory," while the state may regard it as a legitimate exercise of the "police power" and therefore not "confiscation." (*E.g.*, Lee J. Vance, in 25 Yale Law Journ. 285, regards Prohibition as confiscatory, yet the Supreme Court regards it as an exercise of the "police power." Mugler *v.* Kansas, *supra*.) "Police power," "eminent domain," "confiscation," and like terms, are but convenient labels which are attached to legislative acts for the purpose of differentiation. They possess no magic in themselves for the characterization of a legislative act before the final legal authority has applied the label believed by it to be appropriate. Before that final authority has made a pronouncement the terms are purely epithetical and argumentative.

[90] Information from State Department, Washington. At the time of the abolition of slavery there was a fairly general opinion over the world in favor of its abolition. Not so in the case of the abolition of intoxicating liquors; there being much diversity of opinion, and in Europe the theory is found difficult to understand. Nevertheless, it is everywhere recognized that the substance is capable of injurious effects, which perhaps accounts for the failure to protest. It is believed that scarcely any *suppression* of industries would be made the subject of international reclamations. In practice nations have always respected the judgment of the prohibiting state.

"eminent domain" and is to be paid for as such.[91] It is obvious that international differences upon cases of this type cannot be peacefully or permanently settled by any unilateral determination by either of the states involved.[92] Only an international court, following no national system of law, but developing if necessary a rule of international law upon general legal principles, can decide the case objectively. The decision of such a court may conflict with the opinions of many; such is often the case in municipal law, yet the decision settles the matter and stands as a guide for future action.

[91] Pennsylvania Coal Co. *v.* Mahon (1922), 260 U. S. 394, 413. "When it (the damaging interference) reaches a certain magnitude, in most, if not all cases there must be an exercise of eminent domain and compensation to support the act. So the question depends on the particular facts.

[92] There is, of course, even in cases involving wide differences, the possibility of the exercise of mutual concession and good will resulting in the amicable settlement of the dispute. Judicial proceedings are always in order if an *impasse* is reached.

THE PERSONAL DIPLOMACY OF COLONEL HOUSE

By Lester H. Woolsey
Of the Board of Editors

The *Intimate Papers of Colonel House*[1] is one of the most interesting collections of memoirs that has appeared in the post-war period. The contacts of Colonel House, as personal representative of President Wilson, with diplomats and statesmen in the stirring years of the war was probably broader than that of almost any other person, and certainly broader than that of any other American. His papers are so full of interesting comment on men and events that they furnish source material for many essays on different aspects of the times. The purpose of this article is merely to sketch Colonel House's connection with the main international events of the Wilson Administration up to the entrance of the United States into the war. For some reason, his narrative ends with the period of American neutrality and the entrance of the United States into the war. Colonel House's activities in connection with the war program of the United States and the Peace Conference at Paris are not related, and the world must hold its patience for a third volume on this critical period.

Passing over so much of the narrative as describes Colonel House's interest in local politics in Texas where he had acted from time to time as political advisor to Governors of that State, or his relations with Mr. Wilson during the pre-nomination and pre-election campaigns, or his interest in the selection of Mr. Wilson's Cabinet, or his connection with the important measures which the Administration fathered in Congress at the suggestion and with the assistance of Colonel House—passing over these matters of domestic concern, let us take up the narrative where it turns to international affairs—where indeed the Colonel's interest centered, for, as the editor says: "From the beginning of 1914 he gave more and more of his time to what he regarded as the highest form of politics and that for which he was peculiarly suited—international affairs." Even earlier, "During his career in Texas he had never ceased to study current diplomacy." The first task of the Wilson Administration in this field was the settlement of two problems which it had inherited from the Taft Administration, namely, the controversy with Great Britain over Panama Canal tolls, and the question of the recognition of Huerta as President of Mexico.

Colonel House was instrumental in obtaining British support for Wilson's anti-Huerta policy in return for the settlement of the Canal tolls question.

[1] *The Intimate Papers of Colonel House.* Arranged as a narrative by Charles Seymour. Boston and New York: Houghton Mifflin Co., 1926. 2 Vols. pp. xxvi, 471; x, 508. il. Index.

Colonel House's first trip to Europe in the summer of 1913 is mentioned in connection with these matters. During this visit, House explained the American policy in Mexico to Sir Edward Grey and the conversation led to a frank exchange of views on the problems of Huerta and the Canal tolls. In the following fall Sir Edward sent his secretary, Sir William Tyrell, to canvass Anglo-American relations with the President and Colonel House. As a result of this exchange of visits, the two countries came to an understanding in regard to Huerta and the tolls. The success of President Wilson in bringing British support to bear in eliminating Huerta, and in obtaining the repeal of the Canal tolls against the will of an unsympathetic Congress and public opinion, cannot be discounted, and Colonel House's connection with these problems was no doubt of service to the Administration.

Colonel House, however, had a broader vision of America's place in world politics. He believed that the political isolation of the United States was a threadbare policy. It was necessary to develop a coöperative understanding with foreign countries. A working arrangement with Great Britain was needed because of the spread of British contact and influence in Latin America and elsewhere throughout the world. It was advisable also to advocate a policy of coöperation between the countries of this hemisphere instead of that of tutelage by the United States under the guise of the Monroe Doctrine. This policy was put in practice by inviting the A.B.C. countries to confer on the Mexican problem, following the elimination of Huerta. The recognition of General Carranza's Government as a *de facto* government by the four conferring countries in the autumn of 1915, was a tactful effort on the part of Wilson to share responsibility and to disarm criticism by South American States. From this point it was a natural step to broach the Pan American Pact, which aimed to obtain a guarantee of security from aggression, to control the manufacture of arms and munitions and to create a mechanism for the settlement of boundary and other disputes. If this could be accomplished for the Western Hemisphere, thought House, it might serve as a model for Europe, which was living in an atmosphere of reckless militarism.

Colonel House busied himself with pressing this pact upon the attention of the A.B.C. countries, diplomatically circumventing Secretary Bryan for a time. The idea was to bring the South American States into equal partnership with the United States and transform the Monroe Doctrine from a protective assurance on the part of one state into a mutual covenant guaranteed by all American States. The plan received the enthusiastic support of the Argentine and Brazilian Ambassadors, who regarded the proposal as epoch-making. The Chilean Ambassador, however, was somewhat reticent.[2]

[2] For a review of the diplomatic correspondence between the United States and Chile on this subject, which presents the reasons justifying Chile in her attitude toward the pact, see "Wilson's Latin American Treaties" by Carlos Castro Ruiz, formerly Under-Secretary of Foreign Affairs of Chile, in *Chile*, Vol. III, No. 13, March, 1927, p. 69.

Sir Edward Grey also refused House's request that he make a statement in Parliament in favor of the Pan American Pact. In the spring of 1916, with the revolt of Villa against Carranza and the punitive expedition under General Pershing under way, the situation was not favorable to the continuance of negotiations. The early enthusiasm of the ambassadors cooled off, and nothing finally came of the plan, except to serve possibly as the germ of Article X of the Covenant of the League of Nations.

Colonel House's diplomacy, however, had to do chiefly with the European countries and is perhaps best exemplified in his several missions to Europe as representative of President Wilson. Colonel House's first trip, as we have seen, was in 1913, at the time the Huerta and Tolls questions were pending. In this connection, he had already broached to the British his ideas about world affairs. What House wished to do was "to bring about an understanding between France, Germany, Great Britain and the United States regarding a reduction of armaments both military and naval." He also appears to have had in mind an understanding between Great Britain, Germany and this country, and possibly Japan, in regard to the Monroe Doctrine. His idea seemed to be to deflect national energies from building armaments to the development of "waste places" as a mutual field of endeavor. The "waste places" were the backward countries of Asia Minor, Persia, Central and South America. A plan of procedure was laid out and it was decided, with the approval of the President, that in the early summer the Colonel should go directly to Berlin and lay the plan before the Kaiser and, if things were promising, House was to go to England and lay it before the British Government. House was engaged on this mission, which he called the "Great Adventure," from the middle of May to the end of July, 1914.

He picked out the Kaiser as most difficult to convince on the question of disarmament and laid his plans for a personal interview with him alone. He was courteously received but he got nothing out of the Kaiser but a protestation of friendship for England. House was impressed not so much with a policy of aggression in Germany as with an unreasoning nervousness which might result in a reckless attack through fear.

From Berlin, House went to Paris but there he found discussion impossible on account of a cabinet crisis. Thence he went to London where he had interviews with Sir Edward Grey and other British statesmen. Sir Edward was interested but cautious. "I found [says House] Sir Edward a willing listener and very frank and sympathetic." But he had to consider the sensibilities of France and Russia who were parties to the Triple Entente. He did not know how to get in touch with Germany without offending them. He was evidently unwilling to go to Kiel to see the Kaiser as House had suggested. Finally, on July 3, 1914, Sir Edward said he did not wish to send anything official or in writing to the Kaiser for fear of offending France and

Russia but he desired House to convey to the Kaiser the impressions that he had received from his discussions in London.

Accordingly, on July 7th, House wrote a long letter to the Kaiser stating in substance that France was quite content, if she could be sure of her autonomy as it now existed, that she had given over all thought of revenge or the recovery of her two lost provinces, and that he was convinced that the British Government desired an understanding which would lay the foundation for permanent peace and security. He said he was writing quite unofficially but, he was given to understand, with the hope of the British Government that it would bring a response from the Kaiser which would permit another step forward. By the time Zimmermann replied for the Kaiser, on August 1st, war had broken out and the "Great Adventure" ended in failure.

Then came in succession the futile offer of mediation by President Wilson, the proclamation of neutrality, the feeling of revulsion at German methods of warfare, and the impact of war on American trade which was being disrupted by seizures of contraband cargoes. House busied himself with many matters but chiefly with a new plan of mediation between the belligerents, which he first attempted to carry out in Washington. He naïvely suggested a conference at dinner between the two enemy ambassadors, Count von Bernstorff and Sir Cecil Spring-Rice, which was doomed to failure because the two ambassadors were too wary to fall into such an unprecedented trap. No progress in mediation being possible at Washington and our relations with the British being strained over interference with neutral trade and with the Germans over the sale of arms to the Allies, it was decided that Colonel House should go to England and Germany in order to confer directly with the belligerent governments. It appears that Secretary Bryan was disappointed when he heard of this mission, as he had planned to do this himself. This mission extended from the first part of February to the first part of June, 1915.

Colonel House first went to London to begin conferences with Sir Edward Grey, Asquith and others, letting it be known that President Wilson had no desire to suggest terms of peace but merely wished to put himself at the service of the belligerents as a channel of communication on this subject. Ambassador Page appears to have taken little part in these conferences, probably for the reason that he was utterly opposed to the peace policy of President Wilson. Nevertheless, Colonel House played a lone hand and discreetly directed the conversations to the subjects of peace conditions, belligerent rights, "freedom of the seas," etc., in the hope of finding a common basis for beginning negotiations between the belligerents. The British, speaking for themselves, seemed to desire the evacuation of Belgium, an indemnity for the invasion and guarantees of permanent peace, and they thought France would probably desire Alsace-Lorraine, and Russia, Constantinople.

Colonel House reached Paris about the middle of March but he made

little headway there as Delcassé first wished to see what Germany had to say.

In Berlin, notwithstanding the feeling on account of the shipment of munitions to the Allies by the United States, Colonel House valiantly contended that both the United States and Germany had a common interest in the freedom of commerce on the high seas from interruption by the naval Powers. England had a perfect right to have a navy to prevent invasion but further than that she should not go. Naturally Zimmermann would be "exceedingly sympathetic" with this thought. Colonel House's plan for "freedom of the seas" appears to have been the restriction of the contraband list to actual implements of warfare, everything else being placed on the free list, and the limitation of blockade to trade through enemy ports, indirect trade through neutral countries being open. Merchant vessels, whether belligerent or neutral, should be allowed to proceed freely outside of territorial waters so long as they carried no contraband, and should be allowed to enter any belligerent ports unless effectively blockaded. Thus for Germany only German ports could be blockaded while avenues of commerce through neutral countries would be open, and for England a complete blockade would be almost impossible because of the large number of harbors and the strength of the British fleet. This plan being agreed upon, fleets would be useless except "to prevent the landing of a hostile military force and keep essential ports open."

A proposal more difficult of agreement among nations could hardly have been advanced even in time of peace and it is not easy to understand how Colonel House could hope to initiate peace negotiations on such a basis in time of war.

As to peace terms, Germany was not then willing to evacuate Belgium at all or even France without an indemnity and the Allies would not consent to anything less. Neither would Germany make any proposition of peace herself and so the situation stood.

House returned to London the last of April where he again discussed the freedom of the seas with Sir Edward Grey. The latter, however, was unwilling to accept the plan unless it was linked with a guarantee of permanent peace, including aggressive warfare on land. However, a few days later came the sinking of the *Lusitania* which inflamed public opinion in England so much that all chance of initiating negotiations faded immediately into thin air. Colonel House then spent the remainder of his time in London on the immediate difficulties of the United States. The European war in so far as it touched the United States had become a struggle between the German submarine and the British blockade which both infringed American neutral rights. House took up the compromise which President Wilson had previously suggested, but which Ambassador Page had no stomach for pressing, namely, that the British should permit foodstuffs to pass to Germany and the latter should give up submarine warfare. The proposition

was also made to Berlin through Gerard. The British position was that they would consider the proposal if Germany made it, and Colonel House suggested that Germany make this proposal in answer to the *Lusitania* note of the United States, but nothing came of this suggestion. Being able to accomplish no tangible results, Colonel House returned to the United States, having to his credit, as the editor states, that "the personal relations he had created would preserve an underlying cordiality with the Allies."

Upon his return to the United States, Colonel House took a hand in the *Lusitania* controversy which dragged along through the fall and winter. Meanwhile the submarine was hitting all around the mark. On September 19th, the British liner *Arabic* was torpedoed and two Americans were lost, which action Germany, under pressure, reluctantly disavowed. Later the *Ancona* was sunk by an Austrian submarine, which Austria churlishly disavowed. Besides Dumba was dismissed and Papen and Boy-Ed were sent home.

At the same time House was trying to cast oil on the troubled relations with England over the blockading orders and the arming of merchantmen. Meanwhile the Allies were fostering a feeling of contempt for America's passiveness in the face of German insults. The "moral credit" of the United States was fast disappearing.

Then Colonel House made a startling suggestion which led to his trip in 1916 to Europe, namely, that the United States should seek a high ground for entering the war.

> My suggestion is to ask the Allies, unofficially, to let me know whether or not it would be agreeable to them to have us demand that hostilities cease. We would put it upon the high ground that the neutral world was suffering along with the belligerents and that we had rights as well as they, and that peace parleys should begin upon the broad basis of both military and naval disarmament. . . .
>
> If the Allies understood our purpose, we could be as severe in our language concerning them as we were with the Central Powers. The Allies, after some hesitation, could accept our offer or demand and, if the Central Powers accepted, we would then have accomplished a masterstroke of diplomacy. If the Central Powers refused to acquiesce, we could then push our insistence to a point where diplomatic relations would first be broken off, and later the whole force of our Government—and perhaps the force of every neutral—might be brought against them (p. 85).

With the approval of the President, substantially this suggestion was made to Sir Edward Grey in a letter of October 17, 1915. By telegraph Grey suggested that the idea of a League of Nations after the war be added to the proposal, which addition was approved. Colonel House, however, does not print the reply of Sir Edward to the proposal. The latter had not even submitted it to the Allied Governments. He must have a definite offer and

know that the United States would make good before submitting it to them. Thus ended the first offer of intervention. It was then decided to send House to Europe to develop more fully the plan of intervention. Colonel House arrived in England January 5th and sailed for the United States the end of February.

For three weeks Colonel House held conversations with British statesmen without specifying the exact terms of the American offer of assistance. He earnestly discussed the question of peace and the chances of both groups of belligerents to win the war, and at the same time explained the American position regarding the blockade and other difficulties. He stopped only a few days in Paris, avoiding all decisive conversations until his return from Germany. He wished first to have a close-up view of the German attitude toward peace.

At Berlin he had conversations with von Bethmann-Hollweg, the Chancellor, Von Jagow, the Foreign Secretary, and Zimmermann, the Under-Secretary of State. With all of them he discussed the progress of the war, the views of enemy statesmen and, incidentally, gave some advice as to submarine warfare and Zeppelin raids. He encountered the contest in Germany regarding unrestricted undersea warfare. The civil officials were opposed to it, while the Navy backed by the Army believed that Great Britain could be isolated by indiscriminate submarine warfare. It is interesting in this connection to note the Kaiser's attitude toward peace, as shown in his conversation with Ambassador Gerard:

> The Kaiser talked of peace and how it should be made and by whom, declaring that "I and my cousins, George and Nicholas, will make peace when the time comes." Gerard says to hear him talk one would think that the German, English, and Russian peoples were so many pawns upon a chessboard. He made it clear that mere democracies like France and the United States could never take part in such a conference. His whole attitude was that war was a royal sport, to be indulged in by hereditary monarchs and concluded at their will. He told Gerard he knew Germany was right, because God was on their side, and God would not be with them if they were wrong, and it was because God was with them they had been enabled to win their victories (p. 139).

House's four days' stay in Berlin was enough to disclose that the rulers of Germany were in no mood to discuss any peace terms which would satisfy the Allies. However, in his conversations with the Chancellor and others, he had for the moment eliminated the danger of a break over the *Lusitania* dispute.

On his return from Berlin, House stopped off in Paris, and saw the Prime Minister and other members of the French Government in order that they might understand definitely Wilson's willingness to aid the Allies. "It was finally understood [he wrote Wilson] that in the event the Allies had some notable victories during the spring and summer, you would not intervene; and in the event that the tide of war went against them or remained station-

ary, you would intervene" (p. 164). Upon returning to London, he finally unfolded his plan frankly to Sir Edward Grey. His conferences were always without Page, who had no interest in discussing peace. On February 10th, Colonel House wrote the President about his conference, saying:

> We finally agreed that it would be best for you to demand that the belligerents permit you to call a conference for the discussion of peace terms [rather than to intervene on the submarine issue] . . . The Allies will agree to the conference, and, if Germany does not, I have promised for you that we will throw in all our weight in order to bring her to terms (p. 171).

At a later conference with Asquith, Grey, Balfour, Lloyd-George and Reading they personally approved the principle of the American offer but refused to set a date for Wilson's intervention. They still wished to try the fortunes of war against Germany unhampered by any conditions as to the terms in case of victory, but in case the fortunes of war turned against them, then they were prepared to accede to Wilson's suggestion. This tentative understanding was dependent upon the approval of the Allies in the contingency mentioned—in short, "the President should at some time, to be later agreed upon, call a halt and demand a conference." It was necessary, however, to place the proposal before the entire Cabinet, and a memorandum of the understanding was drawn up by Sir Edward and initialled by him.

This memorandum went further than Colonel House's original plan as first outlined, for it added that if a conference of the belligerents "failed to secure peace" the United States would "probably" leave the conference as a belligerent on the side of the Allies if Germany was unreasonable. It is significant that the memorandum contains no statement of approval by Sir Edward Grey, but on the contrary declares that the British Government "could under no circumstances accept or make any proposal except in consultation and agreement with the Allies."

Upon Colonel House's return to Washington, the President gave his formal sanction "so far as he could speak for the future action of the United States" to the memorandum, adding only the word "probably" as indicated, and House confirmed this sanction in a telegram of March 8, 1916, to Sir Edward Grey, followed by a letter of March 10th saying, "It is now squarely up to you to make the next move, and a cable from you at any time will be sufficient." Grey politely declined the offer, and he was unwilling to press the matter upon the French. This occurred in March, 1916, and constituted the second offer of intervention by the President.

It is important to observe that the offer was again made in the following April, and repeated and strongly urged also in May, of the same year. Each time, however, Sir Edward Grey refused to express any official views upon the offer or even to consult the Allies in regard to it. Evidently the Allies did not wish the United States to come into the peace conference, dictating

the terms of peace and carrying away the honors without bearing the heat of battle. They did not intend that Wilson should have the fortune of the Biblical peacemaker. In fact, neither the Germans nor the British or French wanted the United States to lay down terms of peace. This was based upon the confidence of victory on each side and also the suspicion of Wilson's plan for a "peace of justice." Although the American representatives abroad fully advised President Wilson of this feeling of the belligerents, he nevertheless had continued to repeat his offer of armed intervention.

While the President was thus making his offers of assistance to London he had difficulty in maintaining the equilibrium of relations with the belligerents. He was perplexed with the *Lusitania* disavowal yet unobtained, with the armed merchantmen issue, the blockade dispute, the seizure and interference with mails, and the renewal of a submarine campaign in March, 1916, resulting in the ultimatum to Germany in the *Sussex* case.

Up to July, 1916, therefore, Wilson's repeated offers of intervention had received scant attention and the old controversies were still unsettled. To these were added new issues, such as the declaration of the Black List by the Allies in July, the German U-boat episode off the New England coast in October, Germany's warning to resume submarine warfare if the President was not able to bring about a peace conference, and the sinking of the *Marina* on October 28th. At the same time, the Presidential campaign was under way with the Democratic slogan "He has kept us out of war."[3]

The threat of renewed submarine warfare caused the President, for the fourth time, to consider in November and December, 1916, making a final offer of mediation and intervention, but by the advice of Colonel House the plan was modified and changed into Wilson's December note appealing to the belligerents to state their respective peace terms. This brought little but criticism from the belligerents, and President Wilson determined to state his own views as to conditions of peace, which he did in his "peace without victory" address delivered to the Senate, January 22, 1917. On January 31st, formal notice of resumption of submarine warfare was given by Bernstorff, and on February 3rd he and his staff were handed their passports.

Volume two closes with a description of the final period of American neutrality, including the disclosure of Zimmermann's Mexican plot unearthed by the British, the period of armed neutrality, and the overt acts of Germany under the submarine notice in sinking the *Laconia*, *Algonquin* and *Vigilancia*. The volume ends with President Wilson's message to Congress, asking for a declaration of the existence of war.

A reading of these volumes makes one wonder whether President Wilson

[3] It is interesting to observe that House suggested and Wilson agreed that in case he were defeated and Hughes elected, both Marshall and Lansing should resign, and Wilson should appoint Hughes Secretary of State and then resign himself, making Hughes President of the United States immediately instead of after an interim of four months between election and inauguration.

was not after all a greatly over-estimated man. House appears as the creative mind back of the throne, for practically everything mentioned that Wilson did, was advised or foreshadowed by House. One also has the feeling that House thought the statesmen in Europe with whom he had confidential conversations were more seriously impressed with his proposals than they really were. They certainly conversed of matters "freighted with importance," but after all the responsible statesmen only expressed their personal views, which were frequently of approval, but rarely if ever did they dignify them with official sanction. They were, it seems, more desirous (and this they subtly accomplished) to learn the views and purposes of the President, whom they probably thought of as a bespectacled busybody who would not fight. Naturally the belligerents felt that an outsider should not preside over the peace conference and control the disposition of the fruits of victory. Why then should they, while they had a fighting chance, accept Wilson's offers of intervention tied up with his own conditions of peace, which might prove to be inconvenient? The Allied statesmen were wise enough to read the trend of events which were gradually pressing the United States reluctantly and painfully into the war. If the United States entered the war because of the submarine, it would be without any pre-arranged agreement with the Allies or any approval by them of the President's war aims. This is what actually happened in the end and confirmed the judgment of the Allies.

The record of Colonel House's adventures in international affairs speaks for itself and his account of them shows that the hero must have had a wonderfully exciting time. It remains only to add that the idea of a League of Nations to preserve peace appears in these volumes as originally growing out of discussions between Grey and House.

THE INSTITUTE OF INTERNATIONAL LAW

By James Brown Scott
President of the Institute of International Law

The scientific organizations which flourished before the World War have had great difficulty in continuing their labors after its termination. The Institute of International Law has been no exception. It was to have met in Munich in September, 1914, and its program had been completely arranged; but the war which started in August, 1914, necessarily put an end to all arrangements for the session. A resort to arms inevitably brings with it a desire for its avoidance; and the greater the war, the greater the desire. A decade, a generation struggles in the mists and shadows, seeking to extricate itself from the post-war spirit, condemning the past somewhat indiscriminately and advocating innovations which, new in expression, are nevertheless the aspirations of those who, in all time, crushed and bruised by force, seek to replace it by justice.

The Institute of International Law, founded but two years after the Franco-Prussian War, was in itself a concrete expression of this desire; and the manifesto drafted by the skilful hand of the Belgian publicist, Émile de Laveleye, and signed by the founders at Ghent, shows to what extent the Institute of our day has, from darkness to light, returned to the traditions of the founders. "The recent conflicts" reads the manifesto, "have revealed a deplorable uncertainty of the law in the gravest questions, and also even a complete ignorance of the law on the part of those charged with its application. . . . The whole world proclaims it: the relations of peoples should be submitted not less than those of individuals to the laws of justice. . . . This uncertainty of international law is a constant menace to peace. . . ."

Considering it dangerous that international law should be developed by diplomats, acting under instructions from their governments, and therefore possessing too much authority; and that the individual writers on international law, acting in isolation, were possessed of too little authority, the manifesto proposed collective, scientific action, in the following paragraphs:

> Our principal object is to produce, through the uncontrolled action of a limited number of eminent jurists, a statement in as certain a manner as possible of the juridical opinion of the civilized world, and to give to this opinion an expression sufficiently clear and exact to be accepted by the various states as the rule of their foreign relations. . . .
>
> On one hand, diplomats, however able and experienced, do not sufficiently succeed in discovering and stating absolute rules of law, because they can not forget either the instructions of the sovereigns they represent or the particular interest of the nations which they are charged to defend.

> On the other hand, the individual works of jurists, whatever be their merit and reputation, do not have sufficient authority to influence states to dominate their passions and triumph over their prejudices.
>
> Now, aside from the work of diplomats and that of isolated savants, there is room for a new influence: scientific action. It seems to us that in constituting a permanent body, without official character and composed of specialists who belong as far as possible to different states and endeavor to discover and express the rules of justice, morality, and fraternity which they recognize as the proper basis of the relations between peoples, we have the means of making collective science contribute to the law of nations, and it is with this purpose that our Institute has been founded.

In the opinion of the founders, "the Institute would thus gradually prepare by its labors, this codification of international law which is at this very moment so insistently demanded."

How was this to be done following the events of 1914–1918? In 1919 many of the members of the Institute were in Paris, attending the Peace Conference. After an exchange of views, the sentiment was found to be strongly in favor of an extraordinary session. The call was issued, and the Institute met in extraordinary session in Paris, May 8–10, 1919, under the presidency of Sir Thomas Barclay, the first vice-president, inasmuch as the president, Mr. Harburger, of Munich had died in the interval since the last meeting. This session was devoted largely to administrative matters, such as reorganizing commissions, looking forward to the resumption of scientific labors. In the expectation that the Institute would meet at Washington in 1920, Mr. Elihu Root was elected President; but the political agitation incident to the presidential elections held that year in the United States made it inexpedient for the Institute to meet there. In view of these circumstances, and the large number of vacancies due to the death of members and associates during the eight years which had elapsed since the last regular session, the Bureau deemed it advisable to call an electoral-administrative session in Paris. It was held May 28, 1921, under the presidency of Sir Thomas Barclay, the first vice-president. Honorary members, members and associates were elected, and Rome was chosen as the place for the meeting of the Institute in the approaching autumn.

From October 4 to 8, 1921, the Institute met in Rome, under the presidency of the Marquis of Corsi. It discussed a report on the Permanent Court of International Justice and the "Declaration of the Rights and Duties of Nations" of the American Institute of International Law, together with a competing project of the International Juridical Union. A commission was appointed to consider and report on the Covenant of the League of Nations.

In the succeeding year, the Institute held its sessions at Grenoble, August 28–September 2, 1922, under the presidency of M. André Weiss, of France. An elaborate report on the organization and statutes of the League of Nations was discussed and referred back to the commission. A resolution on double

taxation was adopted, as was also one on the classification of conflicts of a juridical nature.

In the summer of 1923 the Institute met (August 4–11) in Brussels, under the presidency of the Baron Rolin-Jaequemyns, of Belgium. It considered at length the interpretation of Articles X and XVI of the League of Nations' Covenant, and adopted certain interpretative rules. It also adopted a series of resolutions relating to the status of international associations, and part of a resolution on foreign judgments. The members repaired to Ghent, holding a session in the Hôtel de Ville, in which, fifty years to date, the Institute had been organized.

There was a feeling among the members of the Institute that it was not in its interest to continue to meet, as it had since the war, in allied countries; therefore, the next session was held in Vienna, August 21–27, 1924, under the presidency of Prof. Leo Strisower, where a project on the execution of foreign judgments was completed, as was also a short project on the conflict of laws in the matter of prescription. It had been decided at Brussels, over protests on the part of some of the older members, to continue the discussion of the League of Nations. This discussion was, therefore, continued at Vienna, and a resolution adopted, with an unusually large number of members abstaining from the vote, as to the diplomatic immunities which should be extended to officials of the League of Nations. Some forty-four members and associates were in attendance. The program, however, was slight, not to say meager, and it appeared to not a few of the members and associates present that the Institute would fail of the purpose for which it was founded, if it continued the discussion of questions so political in their nature as to obscure if not wholly eliminate those of a juridical nature. Accordingly, on the afternoon of August 24th, M. Politis, the first vice president, stated that the activity of the Institute was suffering from the interruption caused by the war and from the inevitable hesitation following it. Strong advocate of the League as he is, he asked if it was really desirable to continue the study of this question, and he proposed the appointment of a commission of three members to aid the Secretary General in reviewing the resolutions voted by the Institute during the last fifty years, and in indicating "those which can be maintained, those which should be modified, and those which should again be the object of thorough study." Thereafter, M. de Lapradelle proposed the following resolutions:

> Desirous of complying by an intensive study with the duties of a mission which each day is becoming more important and more elevated, the Institute decides: (1) to appoint a commission to proceed to the study and preparation of a plan of codification of international public law and international private law; (2) to give preference to new questions or those of a timely character; (3) to include in its program subjects taken in their "ensemble" (for example: the sea) rather than detached fragments (for example: territorial waters); (4) to give preference to subjects which are chiefly connected with the law of peace, and not to those which chiefly concern the law of war.

These propositions were unanimously adopted, and on August 27th before its adjournment, the president appointed Messrs. Scott, Politis and de Visscher to be members of this commission. It was, indeed, high time. The members and associates were losing interest; the scientific character of its activity was being largely questioned, and it was confronted, as so often happens, with reform or dissolution.

In 1625 a Dutchman, Hugo Grotius by name, published his three immortal books on the law of war and peace. It seemed appropriate that the Institute of International Law, carrying on in a collective way the work which Grotius initiated, should meet in the city rendered illustrious by his many labors. It was accordingly decided that the three hundredth anniversary of the publication of the first systematic treatise on international law should be celebrated by the Institute in The Hague. It met in the Peace Palace, under the Presidency of Dr. Loder, first President of the Permanent Court of International Justice. The first administrative session was held July 29, 1925, and when the Institute adjourned, August 5th, it had to its credit one resolution on prescription in international law. Every member and associate had at last become convinced that unless the Institute returned to its early and epoch-making traditions, and adopted drastic measures to restore it to its charted course, it might founder—if a nautical expression be permitted—upon uncharted seas. Plans to this end were presented by M. Politis on behalf of the committee, and adopted by the Institute. The committee of three was enlarged by the addition of the Honorary President and three additional members, under the title of Consultative Committee, to advise the Bureau of the Institute in matters pertaining to the approaching session, which was to be held in Washington, in October, 1927.

Elaborate preparations were made for the Washington session, but for financial reasons the meeting was transferred to Lausanne, Aug. 24-Sept. 2, 1927, with a success which would have more than gratified the American members if the Institute had met in Washington as planned. More resolutions were adopted at the Lausanne meeting than at all the sessions held since the World War, and even more than at any previous session of the Institute. The president was admirably seconded by Messrs. Mercier, Alvarez, and Vicomte Poullet, first, second and third vice-presidents, respectively.

In the course of the session at Lausanne, questions of a general nature affecting the aims and purposes of the Institute itself and its attitude toward the existing law of nations were considered and discussed. When the reporter had explained the project on the responsibility of states, M. Politis suggested the preliminary question, "whether the Institute is called upon to draft a project of international convention or a series of doctrinal resolutions." He declared himself in favor of the second alternative. M. de Lapradelle expressed the opinion that "whatever form the Institute might adopt—declarations of principle, *voeux* or projects of convention—it could only give to them the form of resolutions." The project of a convention

which had been laid before the Institute, meant, in his opinion, nothing more. "Such, indeed, is the rôle of the Institute which should, without forsaking practice, move in advance of the states in the path of realization, without waiting for actual cases. But there is nothing to prevent resolutions from being presented in the form of a project of convention, understood as an ideal project susceptible of adaptations in the future to practical necessities. What this discussion should render precise is the exact meaning of the resolutions of the Institute. Do they state existing law, or do they—in contact with possible present cases—point out the law which ought to exist? No better answer can be made than the one made at the Christiania session by Mr. von Bar when he said: 'Alongside the *lex lata* the Institute should build the *lex ferenda*.'" These views undoubtedly represented the general opinion of the members and associates present, and were in strict accord with the practice of the Institute from the day of its foundation.

There were seven projects of public international law, and two projects of the conflict of laws which were adopted in the form of resolutions. Those of public international law were: Responsibility of States for Injury to the Person and Damage to the Property of Foreigners; International Aerial Navigation; Radiotelegraphic Communications; Navigation on the High Seas; Submarine Cables; Arbitral Procedure; International Commissions of Conciliation. The resolutions on private international law dealt with *locus regit actum* and the law of cheques. Each of these deserves at least a word in passing, on its nature and importance, and some an analysis of their main provisions.

International Responsibility of States for Injury on their Territory to the Person or Property of Foreigners. (Thirteenth Commission; Reporter, Mr. Strisower.)

The resolution on the responsibility of states is a small affair if it be judged by its size. It has a few phrases by way of preamble, and it ends with two short *voeux*. There are but twelve articles. However, if their importance be taken into account, they should be studied by internationalists and pondered by statesmen.

The original text had been carefully prepared by Professor Strisower, past president of the Institute, and professor at the University of Vienna, as the result of an exchange of views with the members of the Thirteenth Commission, having the subject in charge. Its consideration and adoption in final form occupied no less than five of the sessions of the meeting at Lausanne. The project is limited, as stated in the *voeu* forming the preamble, to peace between nations. This does not mean that states are not responsible for their violations of international law in time of war; but that the responsibility in peace and war being different, each phase of the subject should be considered separately and only at such time, or times, as either or both may be discussed in a spirit of scientific detachment.

The first article lays down the principle of responsibility in such a way as to render the state responsible for a failure to comply with its international obligations, without making the obligation depend upon the acceptance of one or other of the contending theories of responsibility. At the same time, the question is neither raised nor decided whether the state is responsible as such, or as the mere agent of the responsibility of its subjects or citizens. It was thought, and no doubt wisely, better to defer discussion of the question whether only states or their citizens are subjects of international law. Indeed, it was decided that this question should be referred to a commission for study and report at a later session.

The state, therefore, is declared by the first article to be responsible for an action or an omission contrary to its international obligations on the part of any one of its various classes of agents; and it is even responsible when its agents act in accordance with, or contrary to its laws, provided that the action violates an international obligation. It is further responsible for injury caused by its agents in excess of authority for acts which they have committed under cover of their official position and with the official means at their disposal. It is, of course, necessary that the injury in question shall be the result of fault on the part of the agent, unless the state has by treaty or custom waived the existence of fault in the special case.

Corporate bodies exercising a function are assimilated to the responsibility of agents (Article 2).

But injury may arise by the action of the state's citizens or subjects. If they were agents, there would be no doubt, but if their acts causing damage result from a failure of the state to take measures which it normally could take to prevent their commission, then the state is taxed with responsibility (Article 3). Cases of this kind are unfortunately frequent, and it is in vain that the state insists that it accords to foreigners the protection which it secures to its own citizens or subjects. The minimum is the protection of the national; the foreigner has in addition the right to the degree of protection in excess of the natives when international law so decrees. This provision of Article 4 presupposes that the state is organized internally in such a way as to meet the requirements of the outside and civilized world; hence the added requirement of international law.

Often a foreign state complains of injury done to the person or property of its citizen or subject because of a delay, denial or perversion of justice through the courts of the state in which the question arose. These matters are disposed of in Articles 5 and 6 of the project, in terms which should be quoted, rather than summarized:

> The state is responsible under the heading of denial of justice: (1) when the tribunals necessary to assure the protection to foreigners do not exist or do not function; (2) when the tribunals are not accessible to foreigners; (3) when the tribunals do not offer the guaranties which are indispensable to the proper administration of justice (Article 5).

> The state is likewise responsible if the procedure or the judgment is manifestly unjust, especially if they have been inspired by ill-will toward foreigners, as such, or as citizens of a particular state (Article 6).

It has been intimated that a state is responsible for the damage caused by its citizens or subjects which it might have prevented under normal circumstances. This is the rule in ordinary cases. However, it may happen that a state is, so to speak, overpowered or taken aback momentarily by a mob, a riot, an insurrection or civil war. This is, of course, an exceptional case and requires an exceptional rule that it is not responsible for damage which it could not have prevented by that "diligence" which it would ordinarily exercise (Article 7).

The project defines the kinds of diligence. It would perhaps have been better to say that the state under such cases would only be responsible for the use of the means of protection at its disposal. In so doing, it would have reproduced the phrase of the Second Hague Peace Conference which has supplanted the "due diligence" of the *Alabama* case. In any event, the state is at least obliged to accord foreigners the benefit of those indemnities to which its nationals would be entitled. There is a further exception, which the project notes, that of insurgents whose belligerency has been acknowledged by the foreign state in question. In such a case, the responsibility ceases in respect to the state which has acknowledged the belligerency. The project wisely refrains from discussing the extent to which a state is responsible for the acts of its insurgents who, after the recognition of their belligerency, have become the government of the country.

The law of the state must be such as to guarantee the rights accruing to foreigners under international law. This is, indeed, the general rule, but the question may arise, indeed it often has arisen, whether a federal state is to be considered as if it were a single or unitary state, and as such, responsible for actions occurring within the territory subject to its jurisdiction. In other words, to use a concrete example, is the Government of the United States responsible for the acts of each one of the forty-eight states and the territories, and for the damage caused to foreigners within the State or territory contrary to international law? The response of Article 9 is in the affirmative, and rightly; for, although the members composing the federal state may control their administrative officers, the federal government is vested with their representation abroad and, therefore, the federal government is responsible, whether or not it be in a position to recover the damages from the component State, or is in a position to prevent the damage caused by the component State. It is no defense to the federal government that its constitution does not accord it this right, as the constitution of every state, unitary or federal, must be in accordance with the law of the international community. If it is not, it can be amended; it should be amended; it must be amended, or the federal state must assume liability or suffer the consequences of failure to do so. The Government of the United States rejects

this responsibility in theory, but admits it in fact by according, as an act of grace, compensation for injury to persons or damage to property. A federal statute could and should be passed; but whether passed or not, the Government of the United States should be and is liable; and it is only because of its liability that compensation by act of Congress is accorded. The acceptance of this responsibility under Article 9 of the project would assure to the nationals of every foreign state residing within the jurisdiction of the United States that protection by law which the administration of justice without fear, or favor, or question of nationality requires. The question raised by the article is one of great interest, therefore, to the Government and people of the United States.

The balance of the article, taxing a protecting state with responsibility for its protectorate, does not apply to the Western World, inasmuch as the American Republics do not indulge in protectorates. In other parts of the world where protectorates exist, it is but natural that the protecting government should be responsible for the actions of the protected state to the extent of the protection accorded.

The duty of the state is to prevent the violation of international law within its jurisdiction. If, however, the violation occurs, it is the duty then to repair the damage which has been suffered, whether the reparation assumes the form of an apology, or the punishment of the guilty party, or indemnity to the persons injured, including mental suffering. The nature and amount of the reparation are, of course, not discussed in the project (Articles 10 and 11).

As in the case of Articles 5 and 6 dealing with delay, denial and perversion of justice, Article 12, the last of the project, dealing with diplomatic intervention, should be quoted without summary or comment. The article is thus worded: "No demand for reparation is to be presented through diplomatic channels on the part of the state so long as the injured party has at his disposal a resort to effective and sufficient means in order to secure the reparation to which he is entitled." Nor is a demand for reparation permissible if the state, taxed with responsibility, places at the disposal of the injured party an efficacious method of procedure by which he may obtain the damages accruing to him.

The *voeu* prefixed to the text of the resolution, which may be considered as its preamble, expresses the hope that its rules may enter into the practice of nations; and although the Institute does not say so in the *voeu*, it is in the interest of nations that their practice should be in accordance with its resolution.

The final *voeu*, consisting of two paragraphs, is in accordance with the spirit of justice which little by little has come into the world, and, as was to be expected, is in advance of the letter. The first paragraph expresses the hope that the states shall bind themselves in advance to submit disputes concerning their international responsibility through damage suffered to the person or property of foreigners within their jurisdiction, to an international commission of inquiry, if it be necessary to determine the facts; to a commis-

sion of conciliation in order to reach an adjustment; and, failing to reach an agreement, to the Permanent Court of Arbitration, the Permanent Court of International Justice, or to any other international court; the second paragraph, which would have gladdened Mr. Bryan's soul, recommends that the states abstain from any and every act of coercion until recourse shall have been had to these instrumentalities of justice and of peace.

In the course of its beneficent existence of fifty-four years, the Institute of International Law has many a claim to the world's gratitude; and without suggesting that the series of articles on the responsibility of states for damage caused to the person or property of foreigners within their jurisdiction is of greater importance than any which it has to its credit, or that it is even of greater importance than many others, it is, nevertheless, well within the bounds of propriety to say, indeed to insist, that the project is worthy of the Institute whose declaration it is, and that it would of itself go far to justify the creation of the Institute if it were not already in existence. It is a well-nigh perfect piece of codification, in the sense of stating the law as it is and of developing it and transmuting it into what it should be in accordance with the fundamental and recognized principles of justice. If the members of the Institute had been bound by instructions from the governments of their respective countries, twenty-two in number, or had felt that they represented them even in the remotest degree, it is doubtful if they would have been able to draft a project which would have met with the approval of jurists drawn from the world at large. It was a triumph, not of officials, but of men of good will.

International Air Navigation. (Eleventh Commission; Reporter, Mr. Fernand de Visscher.)

This question has been considered by the Institute on various occasions, notably at the session of Madrid in 1911. Its importance was foreseen in time of peace, but the use made by aircraft during the World War gave an importance and timeliness to the question which it had not hitherto possessed. As in the case of the resolution on the responsibility of states, the Institute was of the opinion that any resolution adopted on aërial navigation between states should be limited exclusively to times of peace. Leaving aside for the moment the principle of free or restricted navigation of the air space, the Institute devoted two sessions to the subject.

In its original form, the project consisted of an elaborate preamble and five articles. It emerged from the discussion shorn of its preamble; a new article was substituted for the fifth of the original project, and here and there important amendments were made in the first four articles. The first article consisted of three paragraphs. The first, laying down the rule of free circulation, was rejected. The second, consisting of two sentences—the second of which, requiring the rules to be applied without distinction of nationality, was unanimously adopted. The first sentence of the article was

modified in such a way as to accord to the state the right of regulating navigation above its surface, taking into account requirements of its own security as well as the security of its inhabitants and their property. The third paragraph, to the effect that the liberty of international circulation carried with it the right of landing, was dropped as a separate paragraph to be included with the right of the state to regulate aërial navigation in the final form given to the second paragraph of the first article.

The second article of the project consisted of two paragraphs, the second of which had the good fortune to be adopted without change, and the first paragraph escaped with an amendment of its first sentence and the omission of a word in its second. As thus adopted, the article provided that aircraft engaged in the transportation of persons and property should enjoy the rights specified in Article 1, to make it clear that commercial, not military, aviation was considered. The second paragraph was to the effect that aircraft engaged in the public, regular service of transporting persons, property or mail, were not to be subjected to regulations which would prevent them from performing the service which they had undertaken.

The original text of the third article of the project, consisting of two paragraphs, was only slightly modified in its initial version in order to make it clear that aircraft belonging to the state or engaged in carrying military supplies or under military control, were not to enjoy the benefit of the above rules regulating commercial navigation; and, quite naturally, it is provided in the second paragraph that military aircraft are to enjoy immunity from the local laws when flying over or landing upon the territory of a foreign state.

Article 4 passed the censorship of the Institute without modification, providing that the aircraft should have a nationality and one only, which should be that of its place of registration; that each state should determine the persons to whom, and the conditions according to which, registration should be granted or withdrawn. In the absence of a special convention to the contrary, no state should grant registration to aircraft having their home port (*leur port d'attache*) in another state. In case of a change of the latter, the original nationality should continue until a new one had been acquired. The nationality of each aircraft should be marked in such a way as to be visible. The purpose of the resolution was to facilitate aërial navigation between states, at the same time protecting any state against an abuse of the privilege on the part of another state. It might be that a state was remiss in the matter of registration, or that it did not subject its aircraft to that degree of supervision which would secure other states from violation of the rules embodied in the proposed resolution.

The fifth and final article sought to protect all states from laxity of registration or supervision, by the simple provision that until the matter was regulated by a general convention, each state could prohibit such aircraft from navigating above its territory.

It was not without reason that the presiding officer congratulated the

reporter upon the success with which his labors had met at the hands of his colleagues. The subject was one bristling with difficulties, overcome, as so often happens, by good will and a genuine desire to succeed, in a peaceful and conciliatory atmosphere.

Navigation on the High Seas. (Seventh Commission; Reporter, Mr. Blociszewski.)

As laid before the Institute by the reporter, the project consisted of a declaration of the principle upon which the freedom of the seas should rest; a question as to whether an international agent should be created in order to control the use of the high seas; likewise the question whether the abuse of the flag upon the high seas should be submitted to a commission; a declaration on piracy and its extinction; and, finally, a draft of a *voeu*. The tale of the project is soon told. A declaration proposing that the sea be considered a thing of common use, instead a thing belonging to nobody, was rejected and replaced by an admirable article which involved the elimination of its two questions. Piracy and its extinction were, if the expression be permitted, thrown overboard. The project of *voeu* was retained. This apparently drastic action on the part of the Institute does not mean, however, that the report of the project annexed was without value. On the contrary, it gave rise to one of the most interesting discussions of the session and resulted in the adoption of an article small in extent but large in importance, assuring the concrete liberty of the seas without making it depend upon the acceptance of phrases such as *res nullius*, *res communis usus*, or even their combination in the single phrase of *res nullius communis usus*. The outcome was due to the feeling, apparently general, that *res nullius* meant one thing, and *res communis* an inconsistent thing, and that the best way out of the difficulty was to drop phrases and cling to the substance. Because of this feeling the following statement was, barring three votes and an abstention, unanimously adopted:

> The Institute of International Law declares that the principle of the freedom of the high seas includes notably the following consequences:
>
> I. Freedom of navigation on the high seas under the exclusive control, in the absence of a convention to the contrary, of the state whose flag the vessel flies.
>
> II. Freedom to fish in the high seas under the same conditions.
>
> III. Freedom of laying submarine cables in the high seas.
>
> IV. Freedom of aërial navigation over the high seas.

The *voeu* with which the commission ended its project did not have the good fortune to meet with the approval of the reporter, who proposed its suppression. The Institute, however, was of a different opinion, and retained it, to the effect that in order to promote the protection of fishermen and of submarine cables, men-of-war and merchantmen should be required to avoid certain routes; and submarines of both categories to navigate only

on the surface within waters to be specifically determined; and finally, that the governments be requested to complete the Convention of London of January 20, 1914, in this sense.

Radio-telegraphic Communication. (Eighth Commission; Reporter, Mr. Cavaglieri.)

It would be supposed that the report dealing with radio-telegraphic communications would give rise to much discussion and a difference of opinion, and that the project, if it passed the censor, would hardly be recognized even by the reporter. As a matter of fact, it fared better than any other report of the entire session. The project received but an amendment here and there, accepted cheerfully by the reporter as in accordance with the project, and the six articles of the resolution were, with but a single contrary vote and one abstention, unanimously adopted.

The reporter is to be credited with the success of the project. The members of the commission wisely contented themselves with a statement of general principles, without complicating them with details. These general principles were the freedom of transmission, saving, however, the right of the state to take measures of protection when they should seem to be necessary. The practical result was what the reporter and his colleagues had in mind,—whether the theory of liberty or control should be adopted. The subject, he said, fell into two parts, the first dealing with the emission and receiving of wave lengths (*des ondes hertziennes*). In this phase of the matter, the sovereignty of the state should be complete, subject of course to international treaties and conventions. The second division relates to the passage of the wave. Here the principle of liberty should be adopted, with the right on the part of the state to protect itself against unneighborly action.

The subject fell into another division of two parts: radio activity in war, and in peace. In the first division great progress has been made, the results of which are withheld from the public. The reporter, therefore, was of the opinion that the Institute should deal solely with the regulation of radio activity in time of peace. In a word, the purpose of the commission, as explained by a member from the floor, was, first, the security of the state, second, liberty of communication; and the task of the commission was to define the limits within which each principle was applicable and to state the rules which resulted from their combination.

The first two articles were unanimously adopted; the third was amended by substituting "right" for "power," upon which it, also, was unanimously adopted. The fourth was amended in two respects: the substitution of the expression radio-telegraphic stations situated within a state, for the expression "of" a state, and the substitution, in a later passage of the article of "other states" for "neighboring states." With these two amendments unanimously accepted the article was unanimously adopted. The fifth article was amended by the omission of the word "frequent" and by the unanimous

acceptance of an additional paragraph. The sixth article was likewise unanimously adopted.

In view of the importance and timeliness of the subject, an international conference meeting in Washington during the month of October, 1927, the text of this resolution is reproduced in its entirety:

> I. Each state has the right, in the absence of a particular convention, to regulate (authorize, prohibit, control, etc.) according to its pleasure the establishment and operation of radio-telegraphic stations situated within its territory, irrespective of their ownership.
>
> II. It also has the right, in the absence of conventional limitations, to suspend international radio-telegraphic service whenever it considers it necessary for the preservation of its essential interests or for the performance of its international duties.
>
> III. It does not, on the contrary, have any right to prevent the simple passage of wave lengths over its territory.
>
> IV. The exploitation of radio-telegraphic stations situated within a state should be organized in such a way as to disturb as little as possible the service of other states. For this reason, it is desirable that the states should reach amicable agreements by means of international conventions.
>
> V. If the radio-telegraphic emissions of a state cause grave trouble to the emissions of another state, this creates an international responsibility and exposes it to the penalties of ordinary sanctions, the responsibility depending upon the technical possibility in each case.
>
> The state is likewise responsible if it does not employ the means at its disposition to prevent radio-telegraphic emissions which, by their content, are of a nature to disturb the public order of another state, when similar emissions have already been called to its attention by the latter.
>
> VI. The aforementioned rules apply equally to radio-telegraph and radio-telephone.

Submarine Cables. (Ninth Commission; Reporter, Mr. F. R. Coudert.)

The report of the commission, presented M. Basdevant in the reporter's absence, dealt with the subject in war, as well as in peace. In accordance with the general rule, only questions concerning peace were considered. The project of the commission dealing with this phase of the subject was composed of four articles, all of which were adopted with the exception of the fourth and a slight amendment to give the draft more the form of a *voeu* than of a command. The fourth article was to the effect that in case of injury to submarine cables, suit could be brought in the courts of the country to which the defendant belonged, or in courts of the country nearest the place in which the offense was committed, or nearest the destination of the vessel causing the damage. The question involved was very large, very complicated, involving sovereign sensibilities which are more easily ruffled than personal sensibilities of the ordinary man, woman, or even child. There might well be a difference of opinion as to each of the three suppositions; and without profound discussion extending over considerable time, it is doubtful if any agreement could have been reached on this subject. The

difficulty is one in which time as well as intelligence and good will are required. As the *voeu* adopted is as short as any commentary, or perhaps shorter, a translation is given, instead of a summary:

> The Institute adopts the following *voeux:*
>
> I. That the various states agree to ratify the rules proposed at the Conference of London in 1913, rules which effectively complete those proposed by the Conference of Paris of 1884.
>
> II. That the various states insist that the proprietors or lessees of submarine cables simplify as far as possible and unify the preliminary measures to be taken for the reimbursement for losses of machinery or apparatus destroyed or voluntarily abandoned by fishermen or navigators for the purpose of preserving submarine cables.
>
> III. That the different states agree, with regard to the prevention of "*délits ou quasi-délits*" committed in the matter of submarine cables, to establish the uniformity advocated by Professor Renault from 1879.

It should be stated, in conclusion, that the entire text, as well as each of the articles, was unanimously adopted.

Arbitral Procedure. (Fourteenth Commission; Reporters, Messrs. De la Barra and Mercier.)

The report of the commission dealt with certain phases of arbitration. It was in the form of five numbered articles. The first stated that the Institute's project of arbitral procedure of 1875, which had indeed opened the way to all subsequent development, was no longer adequate to existing conditions, and suggested that the Institute should continue the work then so auspiciously and so successfully begun, and prepare a code of international procedure applicable to actually existing conditions. This suggestion was unanimously adopted, and the commission directed to take charge of the matter.

The second article called attention to the resolution of Zurich of 1877, advising that the parties to a treaty should bind themselves to submit to arbitration disputes concerning its interpretation or application. Although great progress had been made in this line, the article recommended that the Institute should reaffirm and strongly renew its suggestion and in the following form:

> That the states which are not yet bound by conventions of conciliation and obligatory judicial settlement should insert in their treaties such a clause, stipulating recourse to a competent international tribunal in case of disputes as to the interpretation and application of the treaties.

This recommendation was adopted unanimously.

The third recommendation was in itself a cry of victory, to the effect that the resolution of the Institute at Christiania of 1912, advocating the establishment of a Permanent Court of International Justice, was no longer necessary, inasmuch as the court had been established and was in operation

at The Hague. The recommendation, therefore, was that nothing further was needed to be done in this matter, a recommendation which, fortunately, could meet with the unanimous approval of the Institute.

The fourth article of the project referred to the resolution of Edinburgh of 1904, which provided that "the Institute of International Law is of the opinion that in case of divergent interpretations of international conventions, the governments should resort to the intervention of the Permanent Court of Arbitration at The Hague." In the opinion of the reporters of the commission, the resolution should not be continued in its original form, inasmuch as the Permanent Court of Arbitration is not open to individuals. The reporters were also of the opinion that the resolution was too restricted, in that it did not provide necessarily for a decision of the question submitted to the Permanent Court. They therefore suggested that the following be substituted for this part of the resolution: "The Institute of International Law is of the opinion that in case of divergent interpretations of conventions relating to international unions, the governments should have recourse to the decision of a competent international authority." This recommendation of the reporters was unanimously adopted.

On the question of opening international tribunals to private litigation, the commission recommended the adoption of the following resolution: "The Institute, considering that there is a grave omission in international judicial organization in respect to the protection of private interests viewed from the international standpoint, and that progress should be made, by degrees, in this matter, believes it necessary to make a study of this problem and to place it on the program of its labors." This recommendation was unanimously accepted, and the commission instructed to proceed to its consideration.

These recommendations, although few in number, are of fundamental importance. The attitude taken by the Institute in regard to them is convincing proof that its members, conscious of the services of the Institute in the past, are facing the future with the courage and determination of their predecessors, to enlarge the nature and the scope of international law and international procedure both for governments and their citizens and subjects.

Procedure of Conciliation. (Sixteenth Commission; Reporter, Count Rostworowski.)

The report of the commission dealing with procedure of conciliation to be recommended to the nations will doubtless be considered as one of the outstanding features of the session. It is. A captious critic might observe that it is but a statement of existing doctrine which is rapidly affecting the practice of nations. This may be admitted, but it would nevertheless redound to the credit of the Institute to have stated this doctrine in the form of articles which are calculated to meet with the approval of the nations at large. This is one of the purposes of the Institute, and not the least.

Commissions of Inquiry are the order of the day. This is, indeed, a happy

circumstance, but the partisans of one method are often so much in favor of it as to seek to advance it at the expense of other methods of peaceful settlement. Some years ago arbitration was the order of the day; later judicial settlement, and now conciliation. Each step marks a progress, but none of the three, nor, indeed, any method of peaceful settlement should seem to be adopted to the exclusion of any other. Each is needed, and all tend to push war into the background. We should be in favor of each, and congratulate ourselves that there are so many remedies to be recommended in appropriate cases, without seeming to prejudice any by over-emphasis upon one. It is to be said, however, that there is a general opinion in favor of the submission of any and every dispute to a commission of conciliation in order to bring about a settlement, if possible, before it has assumed the proportions which might cause it to be submitted either to arbitration or judicial decision.

The report of the commission, as well as the project, met with general approval, although the project of the report was amended in one very important matter. The reporter was in favor of a series of bilateral conventions of conciliation to be negotiated between two states for the discussion and settlement of their disputes by this method. He was opposed to general treaties providing for the creation of commissions for a larger number of states, or, indeed, for the states generally. It is indeed the part of wisdom to begin modestly in order to grow great. There is, however, such a feeling in favor of conciliation through commissions constituted for this purpose that it seemed to the Institute unwise to express its preference in favor of bilateral conventions, thus excluding from the range of negotiation treaties of a general nature between many of the states, or indeed to declare itself in favor of the type of treaty between two states leaving the nations free in exceptional cases to create a commission for a larger number. An amendment in favor of the larger conception was carried. This amendment of the first article was the only one of importance. It was sought to omit Article 4 by including a resort to commissions of arbitration as well as commissions of conciliation, before proceeding to arbitration or judicial settlement. The reporter was unwilling to yield on this point, and the Institute by a large majority sided with him.

The original project consisted of a preamble, preserved with amendment, and six articles. Of these, the first was amended in order to allow the possibility of conventions for the establishment of commissions of conciliation for any number of states, instead of limiting them to the two states in controversy. The third article was adopted with a trifling amendment in order to fit it to the new first article. Article 4 was amended in such a way as to strengthen the obligation without modification of its other dispositions. The fifth article was unanimously adopted, with slight modification of its phraseology; and the sixth, likewise modified in the matter of form, was adopted unanimously. The project as a whole was unanimously voted, with four abstentions.

In its final form, commissions of inquiry are to be established by bilateral or multilateral conventions (Article 1). Commissions of conciliation are to be created for a particular time, or, indeed, for an indefinite period (Article 2). The members of the commission—preferably five—are to be appointed by the states in controversy, each of the parties having the right to appoint a member and to agree upon the others, including the president. These latter should be neither citizens of the parties in controversy, nor domiciled within their domain. Experts whose presence is considered necessary for the elucidation of the difficulty may be appointed, replacing members, or added to them (Article 3). Article 4 according a preference over commissions of inquiry, if not excluding them (the reporter insisted that such was not the meaning), is thus worded: "All differences between the contracting states, of what nature soever, which it has been impossible to settle through the ordinary channels of diplomacy, must be submitted to a commission of conciliation, unless the parties in controversy have bound themselves by convention or special agreement to lay the dispute before an arbitral or judicial tribunal."

The commission begins its labors only at the request of one or other of the parties. The report, in no sense binding the parties in controversy, is signed by a majority and presented confidentially to the states with a request for an expression of opinion. At the end of its labors the commission is to prepare a *procès-verbal* stating that the parties have or have not agreed. In case of agreement, it incorporates the agreement; but the *procès-verbal* is not to be made public by the commission without the consent of the parties (Article 5). "The commission is free to conduct its procedure, taking account of the provisions of Title III of the Convention of The Hague, of 1907." This title, curiously enough, relates to international commissions of inquiry, a fact which would seem to indicate that the commission of conciliation is intended, in the opinion of its partisans, to supplant by absorbing the commission of inquiry. "The parties are to facilitate the labors of the commission, to abstain from reprisals or other methods of coercion, and, in general, to abstain from any measure which might prejudice the efforts of the commission to bring about conciliation." (Article 6.)

The rule Locus regit actum. (Seventeenth Commission; Reporter, Baron Albéric Rolin.)

Turning now to the projects of private international law, the first to be discussed is the one providing that the law of the place should govern the formation and validity of a contract or transaction of private international law. The classic designation for this principle is *locus regit actum.* The question before the commission was whether the doctrine so tersely expressed in Latin is still generally admitted. The report invokes the authority of the distinguished internationalist, Mr. André Weiss. "The maxim *locus regit actum* is still generally accepted. It has lost nothing of its applicability, especially in France. Although the civil code only admitted it in

three cases (Articles 47, 170, 999), it has been extended without hesitation to all other juridical cases. It is, therefore, to be regarded as understood." Following which the report says: "Such is also the opinion of the reporter. It is also the opinion of the commission." And it may be added, it is also the opinion of the Institute of International Law. The project presented by the commission, adopted with sundry modifications of the text, with here and there a difference, shows the sense in which the Institute considered the maxim as applicable.

As originally presented, the project consisted of fifteen articles. In the process of discussion three articles were amended and three dropped out: No. 3, citing specific examples to which the maxim applied; No. 9, to the effect that the legal formality of the place of the act would not apply to a foreign country without an express provision to that effect; and No. 12, dealing with another phase of this subject, was withdrawn by the reporter. Articles 5 and 6 of the original project were combined, so that the project in its final form consists of eleven articles.

The subject is one which has for centuries past attracted the attention of European publicists. It was stated in general terms in the fourteenth century by no less a person than Bartolus. It was developed by his successors, and it is a doctrine, as the first article of the original and revised project states, still generally accepted. Indeed, it is difficult to see how it could be otherwise, although international conventions may here and there suggest a regulation of its terms in the interest of international continuity. There was, therefore, an agreement upon principle. The question was whether the Institute should content itself with stating the maxim, and its important applications, with an indication of the nature of the limitation which practice and convenience suggest, instead of entering into details which might tend to obscure both principle and limitation. The discussion was the discussion of experts, to whom the maxim, even more universally than *locus regit actum*, applies, that of "many men, many minds." In the end, the original project of fifteen articles reduced to eleven, and in modified form, was accepted by all the members and associates present, with but a single exception.

The project may be summarized in this way: the maxim is still generally accepted and applies not only to the proof of the act or of the judicial fact, but to the form of the act, when its validity depends upon a prescribed form. It does not apply to what is called an enabling act; it does not apply necessarily if the parties can effect their purpose by private deed, although the maxim obtains wherever the state, in the exercise of its right, has prescribed a particular legal form. But properly legalized acts of consuls or diplomatic agents are excluded from its action. Of course the state may, in the exercise of its sovereign will, dispense with formality; but the state may, by express terms, make the validity of an act depend upon a prescribed form, although it is accomplished in a foreign country where such a legal formality does not

obtain. This rule, however, does not apply to real property; for the formalities of transfer, both as to real property and real right, depend upon the law of the place in which the property is situated. And the same law applies to the transfer of a particular object *in specie*. The maxim applies to the recognition of a natural child, whether it be by the certificate of birth, or by another official document. The maxim applies where legitimacy results from subsequent marriage, or by a different legal act. In like manner, the maxim determines the form when adoption requires official authorization. If it take place by act of the parties, the form may be prescribed by the law of the place, even though the act be accomplished in a foreign country which does not require legal forms.

Conflicts of Law in the Matter of Cheques. (Eighteenth Commission; Reporter, Mr. Lyon-Caen.)

The practice of merchants has made what the English-speaking world calls the law merchant, or commercial law, as it is now generally known. It was the law which seemed reasonable to merchants, which grew up among them without the intervention of the states, and whose validity depended upon custom, not upon statute. In the English-speaking world it was the law of the merchants of the Continent until Lord Mansfield introduced it into England in the eighteenth century by the decisions of the Court of Kings Bench. It thus became a part of the common law, and, as such, passed to the British colonies. Under the circumstances, it is but natural that there should be divergencies of practice, and it is natural also that a desire should be widely felt that these divergencies yield to a uniform practice. Hence it is that the Institute of International Law took up one phase of the large question, and its members, as was to be expected, have been able to generalize practice and to recommend a uniform standard, to avoid the conflicts of law in the matter of cheques. In the absence of M. Lyon-Caen, the report was presented by M. Niboyet.

The commission wisely confined itself to a part of the field. It expressed its views within four articles. The first was modified in form, but retained in substance; the second substituted the law of the country of payment in passing title for the law of the country of issue; the third article was adopted in its original form, with the addition of but a single phrase, "in the case of loss or of theft," which had formed the subject-matter of the fourth article. As in two previous cases, the text is shorter than any summary, for it is in itself a summary of enlightened theory and practice on the subject. Therefore, the text of the articles is given as it was adopted by a unanimous vote, with the abstention of but a single member:

> Article I. The conditions relating to the form of a cheque are determined by the law of the country in which it is issued. The cheque is valid, however, if it meets the conditions required by the law of the country in which it is payable.

Article II. The law of the country of payment of the cheque determines if title in the sum involved continues to belong to the maker or is transferred as of right to the payee and to successive holders.

Article III. The law of the country in which the cheque is payable determines

(a) The persons upon whom the cheque may be drawn.
(b) Whether the cheque is necessarily at sight or may be for a given time after sight.
(c) The period within which it is to be presented for payment.
(d) Whether the maker can object to its payment, and the moment from which this objection may be made, notably, in case of loss or of theft.
(e) Whether a cheque may be crossed, and what are the consequences of crossing.
(f) Whether the cheque can be certified, and what are the effects of certification.
(g) Whether the acceptance of the cheque by the drawee is or is not to be deemed as not written.

Conflict of Laws in matters of Contract, especially the determination of the obligatory law applicable. (Twenty-first Commission; Reporter, Baron Nolde.)

This was not the first time that this subject had engaged the attention of the Institute, nor was it the first time that it was doomed to failure. The reporter on this subject had presented his project at the session at The Hague in 1925, where such a divergence of opinion showed itself that he considered it useless to proceed further with the question. He therefore proposed that he be instructed to complete the project by a detailed examination of the different types of contracts, and to adjourn the discussion to a subsequent session. The Institute adopted this suggestion. The reporter therefore prepared a supplemental report which he presented to the session of Lausanne, together with specific applications, in the hope of establishing, with the approval of the Institute, a sole law—the law of the contract—to be obligatory in the "formation, validity, extinction and consequences of its non-execution."

The trouble began with the preamble. It continued with the few articles discussed, which took up two afternoons. It had been felt by many that an agreement could not be reached on this difficult and much controverted subject; with each subsequent hour it became increasingly clear that nothing of value could be accomplished. The honorary president, Baron Albéric Rolin, a master on the conflict of laws, possessing the confidence and admiration of his colleagues, expressed the general belief when he proposed that the discussion should be adjourned. The motion prevailed; and for the time being, therefore, the subject has been dropped.

The result of the session of Lausanne is, therefore, the adoption of nine series of resolutions, the largest number adopted by the Institute in any one of the thirty-four sessions since its establishment in the year 1873. While

ten reports were considered, it had been the intention of the Institute to have a still larger number prepared and presented for consideration at the session of 1927, which was to have been held in the city of Washington. As planned, seventeen reports were to have been prepared, of which fifteen were actually printed and distributed to the members and associates of the Institute in advance of its session. Of the projects prepared, the following, for lack of time, were not discussed: Nationality (First Commission; Reporters, Messrs. Reuterskjold and Gemma); Territorial Waters (Fifth Commission; Reporters, Sir Thomas Barclay and Mr. Alvarez); Vessels in Foreign Ports (Tenth Commission; Reporter, Mr. Gilbert Gidel); Diplomatic and Consular Immunities (Twelfth Commission; Reporter, Mr. David Jayne Hill); Extension of Obligatory Arbitration (Fifteenth Commission; Reporters, Messrs. Borel and Politis). The reports of two commissions were not ready for presentation: Occupation and Mandates (Fourth Commission) and International Rivers and Waters of International Interest (Sixth Commission). At The Hague session, held in 1925, a commission on codification was appointed, in order to act in an advisory capacity to the committee of experts of the League of Nations for the progressive codification of international law. The report of this commission was not discussed for lack of time. For the same reason the reports of the Bureau and the Consultative Committee on the codification of the international law of peace, and on an encyclopaedia of international law were not taken up.

It is expected that the two commissions whose reports were not ready for the session of Lausanne will be presented for discussion at the approaching session, to be held in Stockholm in 1928. With the seven reports ready but not discussed, and the two to be prepared, the session of Stockholm already has a prospect of an ample program. This is not all, however. Arrangements had been made for the preparation of reports on questions determined in advance of the session of 1927, to be presented at the session of the Institute which was to follow it. These are on the admission and expulsion of foreigners (Second Commission); international regulation of "migration" (Third Commission); legal condition of societies in international law (Nineteenth Commission); criminal law in its relation to personal status (Twentieth Commission); protection of minorities (Twenty-second Commission); aërial warfare (Twenty-third Commission). If the reports of these commissions are prepared and presented at the approaching session, not to speak of some other matters which may be added because of their timeliness, the session of Stockholm is likely to be, as that of Lausanne, a business session.

The session of Lausanne emerged from the mists and clouds of war; the session of Stockholm will meet in the clear, long daylight of the North. The days of uncertainty and of confusion following the war have passed, and, as far as the Institute of International Law is now concerned, it is as if the War of 1914 never had been.

EDITORIAL COMMENT

THE CLASSIFICATION OF DIPLOMATIC AGENTS

The choice of titles intended to designate the officers and representatives of a government, and to determine their rank, belongs primarily to the domain of constitutional rather than of international law. A king or an emperor may be disposed to ascribe to his officials functions and attributes which a nation whose head of state is a president might not deem it appropriate to accord.

From this difference of political organization it is evident that the conferring of titles and rank upon diplomatic agents is fundamentally the affair of each individual nation and not of the Society of States. Nevertheless, uniformity in this matter is convenient and helps to solve many problems of order and precedence. It is desirable, therefore, that, while reserving to each nation complete liberty in fixing the titles of its emissaries to foreign countries, there should be some conventional understanding upon the subject and a uniformity of titles which if possible would admit of their classification.

It can hardly be claimed that the classification adopted by eight Powers,—Austria, France, Great Britain, Portugal, Prussia, Russia, Spain and Sweden,—at Vienna, on March 19, 1815, and the agreement of five Powers three years later, at Aix-la-Chapelle, regarding "ministers resident" have ever had any binding authority in the sense of international law. These conventions are simply agreements regarding the rank to be mutually accorded to diplomatic agents by the signatories of these regulations, only five of the eight Powers being signatory to the Protocol of November 21, 1818. It is simply by courtesy and for the sake of convenience, therefore, that the classification thus adopted has been generally followed.

The real desire of the signatory Powers at Vienna, according to the report of the Committee of the League of Nations elsewhere printed in this JOURNAL,[1] was not so much to prevent disputes regarding precedence as to ensure an exclusive rank for the representatives of the great Powers. Having failed in establishing a classification of states, which would have fixed the order of precedence, these Powers resorted to the classification of diplomatic agents by their individual rank. The principle of mutuality in the agreement between the monarchical Powers had at the time the intention and the effect of restricting the ambassadorial rank to those states only which possessed a personal sovereign. "Only ambassadors, legates or nuncios," says Article 2 of the Vienna Regulation, "shall possess the representative character;" that is, the right to represent the person of the accrediting sovereign and to have personal audience of the sovereign to whom the diplomatic officer is

[1] Special Supplement to appear later.

accredited; thus creating an inner circle of private relations and conferences to the profit of the monarchies. Coupled with the necessity of procuring a special *agrément* in the exchange of ambassadors, which custom had already been established, this rule, so far as these signatory Powers were concerned, remanded the states maintaining the sovereignty of the people to a secondary status. It was in effect the work of the Holy Alliance for the purpose of consolidating its influence.

This system was in contradiction to the constitutional conception of the modern state, the representative character of the Minister for Foreign Affairs, and the equality of independent states. All the eminent writers upon the subject are in agreement upon this point. The rise of sovereign republics and the extension of the constitutional system of government have tended to render obsolete the idea that personal sovereigns should have political relations with one another mediated by their personal secret agents.

This result of historical development does not, of course, obliterate or modify the essentially representative character of the diplomatic agent. As sovereignty remains a fact, so the representation of it remains a fact. The substance of the change is that national representation has ceased to be personal and has become constitutional. A corresponding change therefore has, without special conventions, taken place regarding the function of an ambassador. He speaks at present not for a personal sovereign, but simply for his government; and this is the whole function of a diplomatic agent, whether he be called "ambassador," "minister," "minister resident" or "*chargé d'affaires.*"

It was impossible, in these changed conditions, that the United States, for example, should not be sometimes represented by a diplomatic agent of the first rank. Was this to obtain for the diplomatic agent the privilege of carrying his business to the attention of the personal sovereign? Did the United States raise the rank of a chief of mission from that of "minister" to that of "ambassador," in order that in England he might have a right to speak privately with the King, and in Germany to exchange pledges with the Emperor, on the assumption that this privilege was denied to a "minister"? Certainly not. Business of state was no longer to be transacted at the Palace but at the Foreign Office. Conversation with the sovereign was simply a matter of social intercourse. Politically, it had become as futile as the "Willy-Nicky Correspondence" and the Treaty of Bjorko!

As the report of the committee sets forth, history has rendered obsolete an exclusive prerogative accorded to ambassadors by the Regulation of Vienna; but has not abolished the ambassadorial rank. The conclusion of the committee is that the distinction of rank between "ambassadors" and "ministers" should now be completely effaced, and that all rank should be abolished; but, in order that no one should suffer demotion, let all diplomatic agents, except *chargés d'affaires*, be called "ambassadors"!

It is evident that the Vienna Regulation, particularly Article 2, has vir-

tually been cast into the discard. But is that a good reason for a total abolition of rank among diplomatic agents? A diplomatic service, regarded internally and as a whole, is not unlike an army or a navy. It has its chiefs and its subalterns. Men in this service are expected to grow up to designated functions of usefulness and responsibility. From the national point of view, there may be various *attachés*,—virtually pupils in the school of practice,—secretaries of different grades, and counsellors mature in the technicalities of the service. These subalterns are not truly representative. They do not in these enumerated capacities speak for their government. From an international point of view, it is not necessary to classify them. They have no doubt certain essential privileges and immunities as parts of an embassy or a legation, but they represent nothing, unless it is the person of their chiefs, to whom as the representatives of their governments they are in a sense responsible for their conduct.

Only when a diplomatic officer becomes representative of his government is there a necessity for international agreements regarding his rank; for it is only then that rank becomes a matter of international interest. But as much as before there is a practical reason for the existence of rank among diplomatic agents. Whoever is authorized to speak for his government bears the representative character, but he does not do so in equal degree. The same reason that underlies the internal classification of the officers of an embassy or a legation, underlies the decision to have an embassy or a legation at a particular capital, and this must depend upon the volume and character of the business to be discharged. Whether it is an ambassador or a minister or a *chargé d'affaires* who is to represent a government depends upon the judgment of that government regarding the maturity and experience of its spokesman. Rank does not grow out of the function of representation, but out of the degree of fitness to perform the function in varied circumstances, for the mission may be more or less complex, more or less important to the interests of the nations concerned.

Whether it sends and receives an ambassador or a minister does not in any manner affect the juridical equality of a state. What determines the choice is not the right of representation but the degree of complexity and importance of the business to be transacted. The function of representation may, therefore, very well be performed by diplomatic agents of different degrees of maturity and experience, and this implies a difference of rank and of reward. There is as much reason for rank in the representative function of the diplomatic service as there is in the preparatory and auxiliary branches of it, or in an army or a navy, or any service that requires progressive fitness. It would be pure dogmatism to assert that the only reason for ambassadorial rank lies in the privilege of an ambassador to speak personally with the sovereign. Article 2 of the Vienna Regulation does not use that privilege as if it were the reason for the existence of the ambassadorial rank, but interjects the article as a device of monarchical Powers to create an exclusive

circle of intercourse between personal sovereigns and to keep the constitutional states outside the pale. Now that this exclusive privilege is valueless, it possesses no importance and may well be forgotten. How little meaning this restriction really has is evident from the sense in which the word "ambassador" is at present used. Argentina, Brazil, Chile, Mexico, Peru and Cuba are now represented by ambassadors at Washington, and there are American ambassadors at Buenos Aires, Rio de Janeiro, Santiago, Mexico City, Lima and Havana. None of these speaks for or to a personal sovereign.

When an ambassador does not represent a personal sovereign does he still, more than a "minister," represent the sovereignty of his country? He may, under his instructions, represent as much of it as its constitution has confided to his government and his government confides to him, but no more. Where his government can bind, he, under its instructions, can also bind; but in the case of the United States, for example, the full sovereignty of the people has not been confided to the government. Here, and for the most part elsewhere, the day of private bargains with kings and emperors has passed.

Birth, wealth and titles of nobility no longer count in diplomatic relations, but official rank does and must count. It has the same reasons for existing as in the military and naval services. It cannot justly be eliminated from any form of continuous activity and reward of merit. A great soldier cannot be condemned to be always a corporal without violating justice. Rank expresses a scale of acquired qualities without which service would lose many of its motives and the most honorable of its rewards. There is little chance, therefore, that rank in the diplomatic service will be abolished.

There is no juridical reason why it should be abolished. Rightly understood, it presents no interference with the juridical equality of states. As the writers of the report we are considering say, "In the present state of international law, the sovereign is now no longer a crowned head placed at the apex of supreme power. The nation alone is sovereign, and only the nation's interests are entrusted to diplomatic agents. The latter, therefore, whether they are nationals of a great Power or a small State, a monarchy or a republic, or whether they be called ambassadors or ministers, all derive their mission from the same source. The interests they have in keeping are identical; the aim which they pursue is the same."

All this is perfectly true. But, if we agree that all diplomatic agents speaking for their governments have an equally representative character, what bearing does the rank of a diplomatic agent have upon the function of representation? Ambassadors have, in fact, no more representative character than other diplomatic agents who speak with authority for their governments. What the report has established is, that Article 2 of the Vienna Regulation should be abolished. In practice it has been outgrown; it is not, and in truth never was, international law. No ambassador now goes to the Palace for pledges. He does his business at the Foreign Office.

It is proposed in this report that "ambassadors, legates or nuncios should be included in the same class and designation with envoys or ministers plenipotentiary, including resident ministers"; but "*chargés d'affaires* should form a class apart, . . . because their credentials are given them by the Minister for Foreign Affairs and are addressed to Ministers for Foreign Affairs." All, except *chargés*, should therefore be of the same rank. With whom then does an ambassador properly speak when he does business with the state to which he is accredited? Does not he as well as the *Chargé d'Affaires* communicate with the Minister of Foreign Affairs? Clear reasoning seems to require, not the total abolition of rank, which this proposal does not in the end achieve, but the abolition of Article 2 of the Vienna Regulation, which restricts the right to address the personal sovereign to a single class of diplomatic agents.

What the authors of this report appear to be most anxious about is the effacement of the distinction which rank is imagined to impose upon the equality of states. Does the existence of rank in the diplomatic service really affect the equality of states? In what instance has a juridical right been sacrificed or denied because a state was represented by a minister rather than by an ambassador? Would any new right be acquired by calling a minister an ambassador?

Summing up the citations from the writers who have opposed the distinction created between ambassadors and ministers by Article 2 of the Vienna Regulation, the report says: "All these writers, except the last, expressed their opinions long before the League was founded. Since the latter has inaugurated a system in which the equality of States is a fact, and since international law is developing a new spirit, it would indeed be more than strange if we continued to observe an obsolete tradition which has only survived through the negligence or complacency of so-called second-class States."

There has never been in recent times any reasoned dispute regarding the juridical equality of states. Certainly it was strongly asserted and not controverted in the Hague Conferences of 1899 and 1907. What "system" has the League of Nations inaugurated that has rendered the equality of states more of a fact than it was before? When and where has this "system" been inaugurated? Was it in framing the Covenant of the League, by which a majority of the Council was to be composed of the great Powers sitting by right in permanence, while all the other states were to have an occasional seat for only a limited time, not by their own right but by the election of the other Powers? Was it in the constitution of the Permanent Court of International Justice, which provided that the judges were to be elected by the Council and the Assembly sitting and voting separately, in order that the great Powers in the Council might have a veto upon the selection of all the other equal states? Was this equality judged to be a fact by Spain and Brazil when they seceded from the League because they could not obtain

equality with the permanent members of the Council? There was, it may be argued, a practical necessity for this inequality of states in the formation and operation of the League of Nations. This is too obvious to discuss. The foundation of the League is laid upon this inequality. An outsider has no occasion to offer any dissent from this statement. This kind of an organization required this kind of inequality. It was not difficult for the victors in war to inaugurate this system, or for states created or protected by them to accept it.

While the argument for abolishing rank as between ambassadors and ministers can draw no real aid or comfort from the system inaugurated by the League of Nations, it would be equally illogical to pretend to find in that system support for a distinction of rank among diplomatic agents. The truth is that this distinction has no relation whatever to that system. It has its roots neither in the equality nor the inequality of states, but solely in their business relations and the nature of their interests. There should be room in a form of public service like the military, the naval and the diplomatic for the gradation of rank which is necessary for the recognition, when it is found convenient, of merit, maturity and fitness for the transaction of the business in hand. Should the recommendation of this report come into effect, there would be in Washington three "ambassadors" from the British Empire, but it is doubtful if that would contribute in any way to the juridical equality of states.

It is interesting to know that the League's Committee of Experts for the Progressive Codification of International Law is in action, and its efforts in this direction are to be encouraged; but there are fields of international relationship where the reign of justice, the promotion of lawful conduct and the equality of states promise a more fruitful harvest than a new classification, or the abandonment of all classification, of diplomatic agents.

DAVID JAYNE HILL.

COMPETENCE OF THE COURTS IN REGARD TO FOREIGN STATES

The Committee of Experts for the Progressive Codification of International Law, at its third session held at Geneva in April of this year, decided to include in its provisional list of subjects, the question of the Competence of the Courts in regard to Foreign States. The committee reached its decision on the basis of the report of its subcommittee, consisting of M. Matsuda, *rapporteur*, and Professors Diena and De Visscher. The last named seems to have taken no part in the rendering of the report. The committee was of the opinion that even though the conclusion of a uniform agreement between the Powers might meet with serious difficulties, these difficulties were not the same for all divisions of the subject; that, therefore, it was desirable to ascertain, exception always being made of the case of acts of state, "Whether and in what cases, particularly in regard to action taken by

a State in the exercise of a commercial or industrial activity, a State can be liable to be sued in the courts of another State." The committee has accordingly submitted its report in the form of a Questionnaire (No. 11)[1] to the members of the League and to other governments, suggesting that replies be made before December 31, 1927.

The problem of obtaining proper redress for damage caused by the commercial or industrial activity of states has become increasingly acute by reason of the general extension of governmental activities and the tendency to nationalize certain industries. The operation by the state of public services such as the railroads, shipping, the telegraph and the telephone, and the conduct of public monopolies such as those of tobacco, coffee, liquor and salt, bring the state into numerous relations of a private legal nature with its subjects and with the subjects of other states. So long as redress is sought before the municipal courts of the defendant state, the problem is, in the first instance, one of domestic law and politics. As the state is itself the source of law, particularly procedural law, it seems axiomatic that the state cannot be sued except with its own consent. This consent may be given by a general statute. In many cases it will be found to be completely lacking. At best, a foreign plaintiff, when compelled to seek redress in a foreign court sitting perhaps far from where the cause of action arose, is at a disadvantage. The plaintiff, therefore, will ordinarily seek to obtain redress in his own state, or in a third state in which the defendant state may have property. It is under these circumstances that the international question presents itself for which international law is now seeking to develop a satisfactory solution.

M. Matsuda correctly points out that the question whether a state may be subject to the jurisdiction of the courts of another state is connected with the right of all states to independence. "As regards acts of its Government and public administration, a State ought to be—as, indeed, it is—entirely immune from the jurisdiction of another State." Continuing, he shows that there is a difference of opinion as to acts "not in fulfillment of its sovereign functions or governmental duties, but in the same way as a private individual, and, so to speak, in a private capacity."

So far as the practice of the courts is concerned, very little support has been given to this distinction in Germany, Great Britain or the United States. The French doctrine, established by the decision of the Court of Cassation in the case of Lambège and Pouget against the Spanish Government, for merchandise supplied under a contract, seems to rest upon the assumption that one who enters into a civil contract with a foreign state or sovereignty, implicitly agrees to abide by the civil competence and jurisdiction of the foreign courts.[2] The later French decisions draw a distinction between the public and private acts of a state, but not to the extent of per-

[1] Printed in Special Supplement to this JOURNAL to appear later.

[2] *Jour. du Palais*, 1849, I, 166; Dalloz, 1849, I, 9.

mitting any seizure of state property in causes of action arising out of acts of the latter category.[3]

The leading authority in Great Britain is the well known case of the *Parlement Belge* decided by the Court of Appeal in 1880,[4] wherein it was held that a ship owned by the Belgian Government and manned by officers of the Belgian Navy, employed as a mail packet but also incidentally in the carrying trade, could not be libeled by reason of the sovereign's "absolute independence of every superior authority."[5] Some writers are of the opinion that this case might have been decided otherwise had the practice of states been established, as it now is, in operating ships as ordinary carriers of commerce.[6] But it is difficult to reconcile this view with the pronounced tendency of British courts to extend the doctrine of sovereign immunity to cases where the ship, though owned by the state, was chartered to private firms, manned by merchant seamen and engaged solely in private carrying.[7]

The United States doctrine recognizing immunity was established by the Supreme Court as early as 1812 in the case of the *Exchange*.[8] The rule has remained undisturbed to the present day, although inferior Federal courts have, in recent years, called attention to "the inexpediency and impolicy of creating a class of vessels for which no one is in any way responsible," and have been inclined to seek to distinguish certain cases from the authority of the rule.[9]

M. Matsuda, in presenting the report of the subcommittee, draws attention to what he calls the Italo-Belgian system of immunity, which is limited to acts "that are true manifestations of sovereign authority and denied to acts in which the public power has no part and which should, therefore, be subject to the normal rules of jurisdiction."

As early as 1891, the Institute of International Law, upon the proposal of Von Bar, adopted a draft regulation of the competence of foreign states, sovereigns and heads of state, in which jurisdiction was to be admitted in (1)

[3] *Jour. Clunet*, 1919, p. 747; 1920, p. 621.

[4] L. R., 5 P. D. 197.

[5] At page 207.

[6] Garner, in British Year Book of International Law, 1925, p. 142.

[7] See the *Porto Alexandre* (1919), 89 L. J. P. 97; 1920, p. 30. Compañía Mercantile Argentina v. U. S. Shipping Board (1924), 93 Law Jour. Rep. 816.

[8] 7 Cranch, 116. It is significant that Chief Justice Marshall emphasized the point that the doctrine was in derogation of the sovereignty of the *local* state. Furthermore, a foundation for limiting the doctrine to state property engaged in public functions is laid by dictum: "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction" (p. 145). But the Supreme Court has recently refused to recognize the distinction and has extended the doctrine to state-owned ships in the merchant trade. Berizzi *v. The Pesaro*, 1926, 271 U. S. 562.

[9] *The Attualita*, 238 Fed. Rep. 909, at p. 911. The court seeks to distinguish the case from the *Exchange* by reason of the fact that no demand was made by the foreign executive for immunity. See also Garner, *ut cit.;* Nielsen, in this JOURNAL, Vol. 13, pp. 17–20.

actions *in rem* against property located in the territory; (2) actions against a foreign state in its capacity of heir or legatee to property situated in the local state; (3) actions connected with commercial or industrial activities of states; (4) actions in which the foreign state has expressly or impliedly recognized the competence of the court; (5) actions arising out of contracts concluded by a foreign state within the territory, if full performance can be had there as a result of an express clause, or by reason of the nature of the action; (6) actions for damages for torts committed in the territory. According to this solution, the state acts as two personalities. In one capacity it is a person politic, and in the other, a private person. "What the State does *jure imperii* is one thing, and what it does *jure gestionis* is another." As an aid to analytical reasoning this may be helpful, but it still leaves unsolved the principal problem of determining the precise class of cases in which the courts may be given competence over foreign states without affecting their independence, without destroying comity and without threatening international good relations.

The learned *rapporteur* has assembled the arguments on both sides with great impartiality, but seems to have become confused by the conflict of authority which he has collated. He is finally compelled to admit that although certain lawyers and judges have endeavored to build up a new legal theory on the jurisdiction over foreign states, "it would be hard to extract from the above tendency any definite or precise conclusions which could be used as the basis for a uniform arrangement to be concluded between the Powers." One is reminded of Hamlet's reflection: "And thus the native hue of resolution is sicklied o'er with the pale cast of thought." Not that the work of the subcommittee has not been well done; but too much emphasis appears to be laid upon the strictly *judicial* phases of the problem.

Professor Diena, in his observations attached to the questionnaire, seems to have sensed the negative results to which M. Matsuda's report would be likely to lead. The problem before the Committee of Experts is not merely to draw up a list of questions upon which there is already sufficient uniformity to warrant codification, but also to select "subjects on international law the regulation of which by international agreement would seem to be *desirable and realizable.*" Professor Diena cites recent decisions of the Italian Court of Cassation [10] admitting the doctrine of immunity in principle but holding that "a foreign State in the matter of relations of private law is subject to the jurisdiction of the Italian courts in the same way as individuals of foreign nationality." He believes that though Italian law may have gone further than that of other nations, other nations have regarded exceptions to the main rule as logical and that these exceptions "are the portal beyond which there opens out a vista of possible agreements. . . ."

Agreements of this nature are indeed not without precedent in recent times. The International Convention of Berne of October 14, 1890, on the Transport

[10] *Revista di Diritto Internazionale*, 1926, pp. 249–252.

of Goods by Rail (Art. 53, par. 2), allows jurisdiction over parties to the convention in regard to disputes within the operation of the treaty. The Brussels Convention of April 10, 1926, for the unification of certain rules with regard to state-owned vessels (Arts. 1–2), provides that states possessing or operating vessels for the transport of cargo and passengers are subject to the same obligations as those incurred by privately-owned vessels. "As regards these responsibilities and obligations, the rules concerning the competence of the courts, actions at law and procedure, shall be the same as for merchant vessels owned by private persons and for private cargoes and their owners." The Treaty of Versailles (Art. 281) and the Treaty of St. Germain (Art. 233), provide that "If the German (or Austrian) Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty." In the trade agreements contracted by Russia with Germany on May 6, 1921 (Art. 13), and with Austria on December 7, 1921 (Art. 12), the Russian Government "submits to the jurisdiction of and to measures of execution by the German (or Austrian) judicial authorities, so far as concerns relations resulting from contracts made with German (or Austrian) nationals, firms or corporations" in regard to transactions and relations of private law concluded or established in Germany (or Austria). A slightly more limited provision is found in the Italo-Russian agreement of February 7, 1924 (Art. 3).

The problem of jurisdiction over foreign states is closely identified with the development of modern states as economic as well as political units. International law is unable to deal with a congeries of problems under a concept of sovereignty established long before the rise of the industrial system. A similar problem exists indeed in the internal state under the common law where the immunity of the state from responsibility for the tortious acts of its officials and agents has given rise to a reconsideration of long-established principles. Whether this is not now beyond the reach of the courts does not concern us here. But in international relations, the solution of the problem must be frankly sought as a diplomatic or legislative function and not through the codification of existing municipal law. This was well recognized by the late Judge Hough in the *Maipo* case [11] and by the German *Reichsgericht* in the case of the *Ice King*.[12]

The views of Professor Diena will appeal strongly to those who refuse to regard international law as something static. The inclusion of the subject in

[11] 259 Fed. Rep. 367.

[12] (1921), 103 Dec. of the *Reichsgericht*, 274. As indicating the change of international public opinion, the court referred to the Hague Rules of Affreightment elaborated by the International Law Association and now adopted by legislation in a number of states. These rules are stated to be applicable to state-owned vessels engaged in the private carrying trade. The court did not consider the United States to have voluntarily waived immunity from process by reason of the Shipping Act of 1910, nor by the Act of March 9, 1920, authorizing suits in admiralty against the United States.

the provisional list appears to be well within the functions of a committee created expressly for the *progressive* codification of international law.

ARTHUR K. KUHN.

THE CASE OF THE IRISH REPUBLIC'S FUNDS

Interesting questions of immunity, *de facto* government, and state succession have been considered recently in a case argued by distinguished counsel before the Supreme Court of New York sitting in special term for New York County. The questions arose out of a contest over the funds raised in America to aid the republican movement in Ireland. The essential historical facts are fairly familiar and may be summarized briefly much as they were presented to the court.

Ireland for more than a century was a part of the United Kingdom of Great Britain and Ireland under the Act of Union of 1800.[1] In April, 1916, the "Easter uprising" of the so-called "Irish volunteers" occurred in Dublin. Independence was declared and a republic proclaimed. This uprising was rather vigorously suppressed by British military authorities, though the "volunteers" continued politically active. In 1918, the republican party put forward candidates in the regular parliamentary election; and in January, 1919, the successful candidates met at the Mansion House in Dublin and constituted themselves the Dáil Éireann. The Dáil issued a proclamation of independence, adopted a provisional constitution, set up a ministry, and attempted to perform various governmental functions.

The attempt of the first Dáil to govern Ireland fell a good way short of success. Ministries and departments were set up in opposition to the British departments, and for more than two years a volunteer force was maintained which kept up a kind of guerrilla warfare with the British military forces. But the courts which the Dáil established were unable to function and the consular officers sent abroad had no official status. The republic had neither postal service, railroad administration, school system, nor currency, and it collected no taxes. If rightly described as government, it was "government on the run." It was never recognized by any foreign country.

Two loans were authorized in 1919 by the Irish revolutionary organization. The proceeds were vested in De Valera, president of the republic, and two others as trustees by a trust deed approved by the Dáil.[2] More than $6,000,000 were subscribed to these loans by Irish sympathizers in America, each subscriber receiving a printed form of bond certificate which read as follows:

> Republic of Ireland. Bond Certificate and..... To .....: I, Eamon De Valera, president of the elected government of the republic of Ireland, acting in the

[1] 40 Geo. III, c. 67.

[2] The text of the deed is in [1926] Ir. Rep. 537.

> name of and by the authority of the elected representatives of the Irish nation, issue this certificate in acknowledgment of your subscription of $.... to the first national loan of the republic of Ireland. This certificate is not negotiable but is exchangeable if presented at the treasury of the republic of Ireland one month after the international recognition of the said republic for one $.... gold bond of the republic of Ireland. Said bond to bear interest at 5 per cent. per annum from the first day of the seventh month after the freeing of the territory of the republic of Ireland from Britain's military control, and said bond to be redeemable at par within one year thereafter.
>
> EAMON DE VALERA, *President.*

In 1920, the British Parliament passed the "Government of Ireland Act" dividing northern from southern Ireland, conferring a measure of home rule, and providing for elections to local Irish parliaments.[3] The republican party again took advantage of British election machinery to present candidates and the successful candidates constituted themselves a second Dáil Éireann under the constitution proclaimed by the first Dáil. Meanwhile a truce was arranged between republican volunteers and the British forces, negotiations were opened at London, and on December 6, 1921, an agreement was signed providing for an Irish Free State with dominion status within the British Empire. The second Dáil accepted the agreement by a narrow majority. Thereupon it was formally approved, as its text required, by a meeting of the members elected to the House of Commons of Southern Ireland under the "Government of Ireland Act," a provisional government was set up to carry the agreement into effect, and on March 31, 1922, the "Irish Free State Agreement Act" passed the British Parliament.[4] The second Dáil Éireann of the republican movement held its last meeting in June of that year.

It is unnecessary for the present purpose to trace further the transition from southern Ireland as part of the United Kingdom to southern Ireland constituting the Irish Free State to which the United States has recently sent an accredited diplomatic representative. It is enough to say that the provisional government of the Free State proceeded promptly to seek control of the unexpended republican funds. New trustees were appointed, a successful suit was instituted in the Free State courts, and a suit in equity was commenced in New York to recover approximately $2,500,000 of the proceeds of the republican loans remaining in New York banks.

The suit in the Free State courts was brought by the new trustees against the old republican trustees to recover such of the remaining funds as were within the court's jurisdiction and for an accounting. It was held that the funds were raised for national purposes and that the Free State trustees were entitled to judgment.[5] Delivering the opinion of the High Court, Justice Murnaghan remarked: "So far as the matter depends upon international law, in my opinion, the Government of Saorstát Éireann is the successor of

[3] 10 & 11 Geo. V, c. 67.

[4] 12 Geo. V, c. 4.

[5] Fogarty and Others *v.* O'Donoghue and Others, [1926] Ir. Rep. 531.

Dáil Éireann, the former *de facto* government of this country, and is, under the doctrines of international law, entitled to its property and assets."[6] In his opinion in the Supreme Court, Justice FitzGibbon said:

> In my opinion, upon the signing of the Articles of Agreement for a Treaty with the delegates of the Revolutionary Dáil, the ratification of the action of its delegates by that assembly, and the consequent establishment of the Provisional Government as the *de jure* and *de facto* Government of the Irish Free State, that Government became absolutely entitled to all the property and assets of the Revolutionary Government, upon which as a foundation it had been established. It is a settled principle of international law that upon the suppression of a rebellion the lawful Government, upon re-establishing its authority, succeeds to all the property of the usurping Government.[7]

Justice FitzGibbon referred to King of the Two Sicilies *v.* Willcox,[8] United States *v.* Prioleau,[9] United States *v.* McRae,[10] and Republic of Peru *v.* Dreyfus Brothers & Co.,[11] and concluded that "these cases establish the proposition that, if the British Government had been completely successful in crushing the insurrectionary movement in Ireland, it could have claimed and recovered the funds now in question as the successor of the revolutionary Government, which had collected them." "How much more then," said Justice FitzGibbon, "is the Government which succeeded to that of the second Dáil by the express vote of the latter in approving of the Treaty with Great Britain, and by the suffrages of the electorate of Saorstát Éireann, entitled as the lawful successor of the second Dáil."[12]

The suit in New York was brought by the Free State against the republican trustees, depositary banks, and others, and was further complicated by motions to intervene made on behalf of two committees representing subscribers to the loan. One committee contended that the Free State, as successor to the inchoate Irish republic, was entitled to recover the proceeds on condition that it issue bonds similar to those which the republic had agreed to issue. The other committee contended in the alternative that, inasmuch as the republic was never recognized, there should be a resulting trust in favor of the subscribers. The Free State objected that the intervening committees could not counterclaim or pray for affirmative relief against a sovereign plaintiff. The court declined to pass upon the question raised by the objection, on a motion to intervene, but held that the committees had made out a *prima facie* interest in the suit and were entitled to their day in court. The motions were granted on condition.[13]

[6] Fogarty and Others *v.* O'Donoghue and Others, [1926] Ir. Rep. 549.
[7] *Ibid.*, 565.
[8] 1 Sim. N. S. 301.
[9] 2 H. & M. 559.
[10] L. R. 8 Eq. 69.
[11] 38 Ch. D. 348.
[12] [1926] Ir. Rep. 531, 568.
[13] Irish Free State *v.* Guaranty Safe Deposit Co., 126 Misc. Rep. 269; 212 N. Y. Supp. 42.

The intervening committees then filed answers containing counterclaims which embodied their respective contentions. On behalf of the Free State it was moved to strike out the counterclaims as an invasion of the plaintiff's sovereign immunity, but the court again declined to consider the question at this stage. Remarking that the plaintiffs were "clearly right in their contention that under the authorities no affirmative judgment can be recovered herein for a sum of money against the sovereign plaintiff,"[14] the court left it to be determined at the trial whether the interveners were really seeking affirmative relief. The motions to strike out were denied.[15]

At the trial the Free State contended, in the first place, that it was entitled to the funds as successor to the *de facto* republican government which raised the loans. The court reviewed the history of the republican movement in some detail and concluded that "the so-called Irish republic never existed as a *de facto* government." It was "simply an organization fostering a rebellion or revolt against the British government in Ireland."[16]

It was contended for the Free State, in the second place, that it was entitled in any event as successor to "the revolutionary group which raised the money." It was urged, indeed, that the Free State was "the continuation of the very Dáil Éireann" which authorized the loan. This argument the court also rejected, taking the position that the Free State actually succeeded the preceding *de jure* government of the United Kingdom in Ireland and not the unsuccessful rebel movement. "As Dáil Éireann did not succeed in establishing a *de facto* government," said Judge Peters, "it therefore did not displace the existing *de jure* government. It follows, therefore, that the Irish Free State succeeded the only government in existence in Ireland at the time it came into being, to wit, the *de jure* government of Great Britain and Ireland."[17]

The court was of the opinion that on the authorities a claim of derivative title, if it could have been successfully asserted, would have required that the Free State take the funds subject to the agreement which the republic had made with subscribers. An argument that the Free State was entitled apart from any question of governmental succession was rejected as in substance a claim of paramount title unsupported by the facts.

It was contended for the Free State, finally, that the question of succession was a question of Irish law and that it had been decided by the Irish courts in favor of the Free State contention. The matter was not *res adjudicata*, however, since the suits in Ireland and in New York were between different parties. And with the Irish court's conclusion that the Free State became entitled to all the property of the revolutionary organization in Ireland the

[14] See French Republic *v.* Inland Navigation Co., 263 Fed. 410. *Cf.* Kingdom of Norway *v.* Federal Sugar Refining Co., 286 Fed. 188.

[15] Irish Free State *v.* Guaranty Safe Deposit Co., 127 Misc. Rep. 86; 215 N. Y. Supp. 255.

[16] 222 N. Y. Supp. 182, 194, 188.

[17] *Ibid.*, 195.

New York court simply refused to agree. "In the opinion of this court," said Judge Peters, "the only government that had any claim of title whatsoever to these funds in the United States was the British Government, because the Dáil was in revolt against that government, and in none of the documents submitted to this court has there been shown any transfer of title whatsoever of any such claim by the British Government to the plaintiff, Irish Free State." [18]

The court held that the Free State was not entitled to the funds, that the republican trustees should not be permitted to keep them, and that, inasmuch as the British Government had not claimed them, they should be distributed among the original subscribers in proportion to their subscriptions.[19]

The important questions of fact and law which have been raised in the litigation with respect to the Irish funds can hardly be subjected to detailed or critical comment in these pages at the present time. Considerations of space forbid detailed comment. Critical analysis may be attempted more appropriately after the New York litigation has been concluded in the courts of last resort. It will perhaps be sufficient for the present purpose to suggest briefly one or two aspects of the problem which seem thus far to have escaped the consideration of counsel and the courts.

All will agree, no doubt, that the republican trustees should not be permitted to keep the funds. While it may be technically inaccurate to say, as Judge Peters remarked, that "the defendant trustees have no title as owners of the funds in question," it is certainly true that they have no title which they should be permitted to enjoy beneficially. This is probably what Judge Peters meant. Nor is it enough that they do not intend to appropriate the funds for their individual enjoyment. They are not competent to select a new trust purpose; and the possibility of ordering them to make a *cy pres* application seems at least doubtful.

It is unlikely that the New York court's solution, *i.e.*, return to the original subscribers in proportion to their subscriptions, will be as unanimously approved. On the one hand, it may be urged that the subscribers are not entitled to a proportionate return since they have received all that they bargained for, namely, non-negotiable certificates entitling them to bonds of the same denomination "one month after the international recognition of the said republic." On the other hand, a more substantial objection to redistribution may be founded upon the illegality of the original subscriptions. A resulting trust for the subscribers is a remedial trust or trust by operation of law. Equity does not ordinarily decree such a trust in relief of lawbreakers.[20] It would seem reasonably clear that the raising of the Irish loan in America at a time when the Irish rebellion lacked even the

[18] 222 N. Y. Supp. 197.

[19] Irish Free State *v.* Guaranty Safe Deposit Co. (1927), 222 N. Y. Supp. 182.

[20] See *In re* Great Berlin Steamboat Co., 26 Ch. D. 616. *Cf.* Scott, Cases on Trusts, 366 n.

status of recognized belligerency was an unlawful aid to insurrection in a friendly state.[21]

Finally, it may be felt that something remains to be said on those aspects of the case which involve *de facto* government and succession. Certainly the Irish republican movement never attained a *de jure* status through recognition. Yet it was a *de facto* movement of some magnitude. American recognition of the republic would have operated retroactively, so far as American courts might be concerned, to make the movement *de jure* from its inception.[22] If the Irish Free State chooses to regard the earlier republican movement as *de facto* for some purposes, may it not be as well for American courts to attribute to the movement a like significance? In truth, is not the New York Supreme Court in something of a dilemma? The Irish republic raised the loan and hence, the court concludes, the Free State cannot claim by paramount title. But the Irish republic never existed *de facto* and hence the Free State cannot claim by derivative title! There would seem to be force in the remark of Justice Meredith, in his opinion in the suit in the Free State court:

> The Irish Republic may not have attained to complete independence, it may not have obtained international recognition, it may not have become even a *de facto* Government over all the territory that it claimed as its rightful heritage; but at the very least it had advanced to such a stage of self-realization as made it something more than a mere association for the promotion of a particular political ideal, and it had at all events attained such sovereign authority in its own concerns as enabled it to enter into a treaty with the Power from which it sought to shake itself free, and to assent to a modification of the Constitution which it had adopted.[23]

The New York court's analysis of the succession question has a certain logical appeal; but it may also appear, upon closer study, to be somewhat overrefined. It may be that in strict legal theory the Free State government succeeded the government of the United Kingdom without hiatus. Yet in fact something intervened. And since "juridical conceptions are seldom, if ever, carried to the limit of their logic,"[24] it may be urged that courts should take cognizance of the intervening fact. May it be urged, indeed, that even if the United Kingdom be regarded as successor in a strict sense to whatever there was in the way of republican organization, nevertheless the effect of the agreement of 1921 and of the legislation to give effect thereto was to

[21] See De Wütz *v.* Hendricks, 9 Moo. 586, 2 Bing. 314; Habershon *v.* Vardon, 4 De G. & Sm. 467; Kennett *v.* Chambers, 14 How. 38; Cobbett, Cases, 3d ed., II, 366; 22 Mich. L. Rev. 118.

[22] See Luther *v.* Sagor & Co., [1921] 3 K. B. 532; Oetjen *v.* Central Leather Co., 246 U. S. 297; Oliver American Trading Co. *v.* Government of Mexico, 5 F. (2d) 659.

[23] [1926] Ir. Rep. 531, 574.

[24] Cardozo, J., in Sokoloff *v.* National City Bank, 239 N. Y. 158, 165. See also Russian Reinsurance Co. *v.* Stoddard, 240 N. Y. 149, 163.

vest the succession in the Free State having dominion status? Since the Free State courts have held that the succession vests in the Free State, would not the courts of other countries do well to be guided by their conclusion? It would seem that wherever the Free State has received political recognition the question of its succession and status should be governed by the authoritative decisions of its own tribunals.[25]

EDWIN D. DICKINSON.

A QUESTION OF STATE SUCCESSION

The political and territorial changes following the World War raised some intricate questions of state succession a number of which found their way into the courts for final determination. One of the most recent and interesting of these was that of the Irish Free State *et al.* against the Guaranty Safe Deposit Company *et al.*, decided by the Supreme Court of New York (New York County) in May, 1927.[1] The case was an action in equity brought by the Irish Free State to obtain title to and possession of certain funds and securities representing the proceeds and balance of subscriptions to two loans floated by the so-called "Republic of Ireland" during the year 1919, collected in the United States and held by certain trustees in safe deposit boxes in the Harriman National Bank of New York City. These trustees had been appointed by the authorities of the said "republic" to receive, hold, and disburse the proceeds of the loans. Sums aggregating over $6,000,000 had been subscribed by citizens or inhabitants of the United States; of this amount more than $3,000,000 had been transferred to Ireland and expended there for the promotion of the cause of Irish independence and for defraying the expenses of the authorities of the "Republic of Ireland." The balance, nearly $3,000,000, had been left on deposit in New York, where it was at the time the present action was brought, and it was to obtain possession of this sum that the action was instituted against the trustees by the Irish Free State.

It was admitted by all parties that the funds had been raised for establishing a free and independent republic of Ireland but that no such republic was ever established. The Irish Free State, which was ultimately established, claimed that the unexpended funds held by the trustees of the "Republic of Ireland" belonged to it as the successor and "continuation" of the government of the said "Republic," irrespective of whether the court

[25] The writer has learned, since the above comment went to press, that no appeal has been taken in the case and that the judgment directing distribution of the funds among the subscribers is to be carried out.

[1] I am indebted to Mr. Justice Peters of the New York Supreme Court for a manuscript copy of his opinion in the case, and also to the law firm of Messrs. Davis, Polk, Wardwell, Gardiner, and Reed, Counsel for the Irish Free State, for copies of their briefs and other documents.

should hold that the latter organization was a *de facto* government or merely a revolutionary organization or group not possessing a *de facto* status.

The defendants (the trustees) denied the claim of the Irish Free State and contended that they had a right to continue in possession of the funds. Two committees representing the certificate holders—the "bondholders" as they were often called—who had subscribed the funds were permitted to intervene in the suit. One of them, the "Hearn Committee," contested the claim of the Irish Free State on the ground that since the funds had been raised to establish a free and independent Ireland, a consummation which had not been realized, there had been a failure of trust and the unexpended balance should be distributed pro rata among the subscribers. Alternatively, they contended that in case the court should uphold the claim of the Irish Free State, the latter should take the funds subject to the obligation to pay the certificate holders the full amount of their subscriptions with accrued interest. The other committee, the "Noonan Committee," appears to have admitted the right of the Free State to the funds but subject to the condition that it issue its bonds in exchange for the certificates. The Free State on its part contended that since it was a sovereign power, the court had no jurisdiction to render a judgment prescribing conditions which would bind it in respect to reimbursement of the certificate holders.

As stated above, the Free State based its claim to the funds primarily on the ground that it was the *de jure* successor of the organization or group which raised them, regardless of whether the latter was technically a *de facto* government or something else. In support of this contention counsel relied upon the well-known cases of The King of the Two Sicilies *v.* Willcox (1850), 40 Eng. Ch. Rep. 301, 1 Sim. N. S. 301; United States *v.* Prioleau (1865), 2 Hem. & M. 559; United States of America *v.* McRae (1869), 8 Eq. 69; Republic of Peru *v.* Dreyfus (1888), 38 Ch. Div. 348, and others, which establish the rule that a *de jure* government acquires title to the property of a *de facto* government which it has succeeded. It was also contended that since the owner of the funds was the *Dail Eireann* (the parliament of the "Irish Republic") under whose authority they were raised, and since the trustees were residents of Ireland, the *situs* of the property was therefore in Ireland when the Free State came into existence. Consequently the question of the successorship and title to the funds was a matter of Irish municipal law, and since the Irish High Court of Justice, and, on appeal, the Supreme Court, had already in another case involving the question, decided that the legal title to the funds was in the Free State, the matter was *res adjudicata*. The funds were also claimed in virtue of what the courts call "paramount title," that is original title irrespective of succession. Whether, therefore, there had been a case of succession or not, the Free State was entitled to the funds.

Mr. Justice Peters, who heard the case in the New York Supreme Court and wrote the opinion, rejected all these contentions and held that the

organization under whose authority the funds were raised was merely a revolutionary organization, not a *de facto* government, and that the Irish Free State never succeeded it. Although the *Dail Eireann* pretended to issue a proclamation of independence, adopt a provisional constitution, appoint a ministry, establish courts, organize a volunteer force, appoint consuls, authorize loans, etc., most of its officials and agents were "continuously on the run"; they sat in private houses, fields and cellars, and sometimes "an entire department might find it necessary to make a hurried removal through a skylight or down a drain pipe at a moment's notice." The Dail organization was never recognized by the British Government or by that of any foreign country; from first to last it was "simply an organization fostering a rebellion or revolt against the British government in Ireland." The government which was finally established in 1922 was not that of the Independent Republic of Ireland for which the funds were raised, but a totally different government, that of the Irish Free State; it was set up by the British Government with the consent of the people of Southern Ireland, and it was the successor, not of the Dail organization of the so-called Irish Republic, but of the government established in Ireland under the Act of 1800, as modified by the Government of Ireland Act of 1920. How, he asked, can a new government be said to have succeeded an unsuccessful revolt against the existing government or a rebellious organization which never became a *de facto* government? The court observed that if any government was entitled to the funds or other property raised or acquired by the organization which had sought to overthrow the existing government in Ireland and establish an independent Irish republic, it was the Government of Great Britain which had crushed the revolutionary movement. But the British Government had not claimed them. In fact one reason why the court denied the claim of the Irish Free State to the funds was that no documentary evidence had been submitted to show that the British Government had ever transferred its title to the funds, to the Irish Free State. Counsel for the Free State, however, have called the attention of the writer of this note to the Transfer of Functions Order of April 1, 1922, and also to Article 80 of the Irish Free State Constitution, which is a law of the British Parliament, as evidence that the statement of the court on this point was an error.

Another consideration which influenced the court in denying the claim of the Free State was that its government is in fact the government only of Southern Ireland. If, therefore, its title to the funds were admitted, the existing independent government of Northern Ireland would have an equally valid claim to them.

As to the contention of the Free State that the question of successorship was solely a matter of Irish law and since the Supreme Court of Ireland had upheld the claim of the Free State to the funds, the matter was *res adjudicata* between the Free State and the defendant trustees, Justice Peters

pointed out that the plaintiff "bondholders" in the present case were not parties to the suit before the Irish courts, and consequently the judgment of the Irish Supreme Court could not be *res adjudicata* as to them. In fact the Supreme Court of Ireland had never passed on the question of whether the Dail organization was a *de facto* government or whether the Free State was the successor of the *Dail Eireann*, nor had it passed on the question of the rights of the "bondholders" who had entered into contractual relations with the Dail.

Reviewing the cases referred to above and upon which counsel for the Free State relied in support of its claim to the funds, Mr. Justice Peters concluded that they were all distinguishable from the present case and that instead of supporting their contention each was in fact an authority against it. His judgment was therefore that, since the Free State was not the successor of the revolutionary organization known as *Dail Eireann*, but of the *de jure* government of Great Britain and Ireland long established in Ireland, it had no title either paramount or derivative to the funds claimed. Likewise the trustees had no title as owners and hence no right to continue in possession of them. No good purpose, he added, would be subserved by allowing them to continue in such possession, since the Irish Republic for the establishment of which the funds had been raised was never established, and consequently the terms of the subscription to the bonds could not be complied with. The Free State not being entitled to the funds, and the Government of Great Britain having asserted no claim to them, the only parties entitled to possession were the original subscribers.

The demand of the "Noonan Committee" that the funds be awarded to the Irish Free State upon condition that it issue bonds to the certificate holders to the full extent of the original subscriptions, was one which the court had no jurisdiction to allow and it was accordingly denied. Since the purpose or object for which the funds were advanced had become impossible of fulfillment, that is, since there had been a failure of trust, the relief demanded by the "Hearn Committee" should be granted to the extent of a judgment decreeing that they and all other subscribers to the loans in the United States were entitled to receive, in proportion to their subscriptions, the proceeds of the money and securities in question, with accumulated interest, after payment of the proper charges and disbursements taxed or allowed by the court.

There is ground for a difference of opinion as to whether the revolutionary organization or group under whose authority the funds were raised was technically a *de facto* government or something else, and whether, whatever one may think of the strictly legal character of the latter organization, the Free State should be regarded, technically or otherwise, as its successor. But the broad principle that those who contributed the funds in question for the accomplishment of a definite object which had failed and for the future accomplishment of which there is little or no prospect, were entitled

to have them returned, will impress most disinterested persons as sound and in accordance with equitable considerations.

J. W. GARNER.

THE THREE-POWER NAVAL CONFERENCE

The failure of the Three-Power Naval Conference, which met at Geneva on June 20, 1927, and closed its sessions on August 4th, is not without its lessons for the student of international law. Indeed, to one whose primary concern is with the development of a rule of law between nations it was obvious from the start that the conference could at best be successful only in small part. For it sought to attain its end of disarmament by means which were wholly inadequate for their object; it treated as a technical problem what was primarily a political problem; and it failed to clear the ground for its deliberations by determining in advance the very purpose for which armaments exist at all under the conditions of modern international life.

In the background of the conference there was, of course, the seemingly successful Washington Conference of 1921–1922. The good work started at Washington could, it was apparently believed, be extended to other classes of vessels, to cruisers under 10,000 tons, perhaps to destroyers and submarines. But it was one thing in 1921–1922 to limit the building of a class of vessels which had already become more or less obsolete, whose cost was in almost direct ratio to their vulnerability to attack from airship and floating mine, and another thing in 1927 to seek to limit the really effective vessels whose cost was sufficiently small to admit of the frequent replacement of older by more advanced types.

Had France and Italy accepted the invitation of President Coolidge, it is fairly possible that some compromise might have been reached that would have given the appearance of a general limitation of naval armaments, even if the practical results were not significant. But with two of the possible antagonists left out of the negotiations, while all the time included in the calculations, it was out of the question for Great Britain and the United States to retire behind more than their first line of defense, and even that poor measure of success was denied.

The technical discussions of the conference centered upon the application of the principle of "parity" as between Great Britain and the United States. Was this principle, accepted by Great Britain at the Washington Conference as applicable to dreadnaughts and larger cruisers, to be applied to cruisers under 10,000 tons, as well as to destroyers and to submarines? What distinctions were to be made in respect to cruisers coming within the class considered? What size guns might or must they carry? Were the limitations put upon cruisers to be specified with respect to the different sizes and types of cruisers? In like manner were similar distinctions to be made with respect to destroyers and submarines? What was to be the age-limit for replace-

ments of obsolete tonnage? What substitutions might be made in the case of lack of parity in existing tonnage? And behind these and other technical questions there was the larger question of the "global," "inclusive," or combined tonnage of ships of all classes.

There is no need to recapitulate the tedious details of the several proposals put forward by the three Powers, first as preferred claims and later as compromise propositions. More important is it to examine the purposes which the two leading parties had in mind in making their respective demands, and to seek out the political elements of the situation which, although never frankly faced, were the real determining motives behind the respective positions taken by the two governments. Long before the conference met the British Government had, in its acceptance of the invitation of President Coolidge, called attention to the "special position" of the British Empire in respect to the length of inter-imperial communications and the necessity for the protection of its food supplies. Here was a clear suggestion that, however ready the British Government might be to accept the principle of naval parity with the United States, there were certain definite needs to be met in respect to its naval defenses and that these must be taken care of at all events. Consistently with this position, the British Government agreed without difficulty to parity with the United States in respect to cruisers of 10,000 tons, although it insisted that the number of these vessels be kept small. On the other hand, the British Government was only ready to concede parity in respect to cruisers of 7,500 tons or less on condition that it be allowed to build as many of these "defensive" vessels as the needs of the Empire required.

The American delegation parried with the contention that the needs of naval defense were a relative matter, not to be determined by the length of trade routes but by the strength of other navies. Tied up with this larger issue were two other problems that had been fought over at the Hague Peace Conference of 1907 and at the London Naval Conference of 1908–1909, namely, the extent to which the British strength in cruisers might be augmented in time of war by the conversion of British merchantmen into warships and the advantage at which Great Britain was placed by reason of her numerous naval stations scattered in all parts of the world.

The real issue for each government, underlying the technical position taken by its delegates, was obviously the determination of the conditions under which a war might have to be fought in the future, and this involved the assumption that not only might the United States and Great Britain be antagonists on their own account, but that each might find its commercial interests vitally involved as a neutral in a war in which other parties were engaged. While the actual possibility of war between the United States and Great Britain was dismissed by the delegates as "unthinkable," all the while the naval staffs were calculating quite definitely upon the strength of the other country as a possible antagonist, and upon the further contingency that

one or more third parties might join in as allies. The situation presented was therefore one in which, if all possible contingencies were to be provided for, there could be few concessions from the position regarded by naval experts as essential to national defense, and there was thus little margin for the give and take necessary in all such negotiations. The conference failed because the mutual confidence of the governments in their respective national policies was not sufficiently great to overcome the hard logic of the naval strategists.

Upon what counts is it reasonably to be anticipated as a political proposition that Great Britain and the United States may one day be drawn into a war? The statement so regularly made by public men that war between the two countries is "inconceivable," "unthinkable," merely means that with no particular issue confronting them, the two governments realize that it would be folly ever to let any issue reach the point where war would be resorted to for its solution. But while the possibility of actual war is being summarily dismissed, both governments nevertheless continue to regard the "right" to make war and the power to do so effectively as an essential condition of successful diplomatic negotiations. The nation possessing a fleet powerful enough to command the respect of another nation may never need to go to war to enforce its claims. A strong nation takes its stand in a controversy conscious of the fact that the justice of its demand will appear more obvious when it is known to be able to back up its contentions with force. In consequence, while no responsible statesman will admit that any issue between the United States and Great Britain *should* be of such a character that it could not be disposed of by friendly negotiation between the two countries, it is clear all round that neither government trusts the other not to make unreasonable demands which it thinks it might have to yield to if it did not have a navy strong enough to make the other party dismiss all thought of using force.

What of the arbitration of such disputes? Both the British and the United States Governments sent their delegates to the conference perfectly aware of the fact that neither party was prepared to apply its existing obligations of arbitration to disputes of every kind without exception. Reserving thus to themselves the "right" to be each the judge of last resort in its own case, the two governments were also aware that, as international law now stands, each nation is the sole protector of its own safety, the sole defender of its own "national existence." Each must stand or fall upon its own resources. The other nations of the world were, so far as concerned any obligations under international law, simply not to be considered. They could neither intervene of their own right to settle the dispute, nor were they politically organized to come to the aid of the weaker party. Such being the case, it was too much to expect either government to go very far at the conference in making concessions in respect to the strength of its national defenses. That strength must, when all the technical points had been fully

considered, be determined by its own judgment of the political situation; and in estimating the political situation it must take into account the fact that the truest form of defense may at times consist in anticipating the attack of another state or in anticipating the day when another state will have the power to attack successfully. It was the old doctrine of 1914 unchanged.

The interest of the student of international law in the problem of disarmament is, therefore, an interest arising out of the obvious need of a new rule of international law. The old rule of individual self-help, the old "right" of each nation to determine under what conditions resort to war may be necessary, and the old "duty" of third parties to remain aloof from a conflict in which they have no direct concern, still play an active part in the relations of the leading Powers. Their scope has been considerably narrowed by the obligations assumed by the members of the League of Nations, but as these obligations are not binding upon the United States they are also not binding upon other nations in their relations with the United States. It remains still the great task of international statesmanship to develop and apply the principle that all nations are collectively responsible for the maintenance of the general peace and that individual nations must find their security in the collective guarantee of the community of nations as a body. Upon the degree of security which it is possible to attain in this way will depend the extent of effective disarmament.

That the adoption of this principle and the organization of the nations to put it into effect is the necessary condition of disarmament is coming to be recognized more and more upon the continent of Europe as each year goes by. The failure of Articles X, XI, XVI of the Covenant of the League of Nations to give assurance of security led to the attempt to frame the new Protocol of 1924. The failure of the Protocol led to the effort to obtain the acceptance of the principle of collective responsibility within the narrower circle of the parties to the Locarno agreements. Again this year the Assembly of the League is the scene of new plans for mutual guarantees of security and renewed discussion of the fundamental problem of international organization.

Side by side with the efforts being made to attain individual security through collective guarantees are the efforts being made to bring about the adoption of an all-inclusive obligation to arbitrate. The two problems are, as has often been pointed out, interdependent. Both await the development of international law from its present inadequate scope into a more comprehensive system.

C. G. FENWICK.

THE MOST-FAVORED-NATION CLAUSE

At its second session on January 29, 1926, the League of Nations Committee of Experts for the Progressive Codification of International Law appointed a subcommittee consisting of Mr. Wickersham of the United

States, *rapporteur*, and M. Barbosa de Magalhaes, of Portugal, to consider the question: "If it be possible, and in what degree, to reach an international agreement concerning the principal means of determining and interpreting the effects of the most-favored-nation clause in treaties." As a result of the report of this subcommittee, the committee at its third session on April 2, 1927, decided that since "international regulation of these questions by way of a general convention, even if desirable, would encounter serious obstacles . . . the above question should not be placed on its provisional list." Nevertheless, the committee decided to communicate to the governments Mr. Wickersham's report and M. Barbosa de Magalhaes's observations.

This document [1] furnishes a succinct and yet fairly complete study of the legal interpretation of most-favored-nation clauses. Mr. Wickersham's report distinguishes most-favored-nation from national treatment and classifies the various forms of the clause as limited or unlimited with respect to countries, reciprocal or unilateral with respect to the contracting parties, conditional, unconditional or equivocal with respect to favors. By various combinations of these types, nine essentially different forms are illustrated from actual treaties.

Such legal problems as the duration of the privilege, the application of the clause to future favors, and its application to colonies, especially the British dominions, are considered. Mr. Wickersham believes that "small areas locally contiguous form an exception to the operation of the clause," and intimates that even Cuba or Canada might come within this exception in relation to the United States. It seems doubtful whether such exceptions can properly be claimed unless specified, as was Cuba, in the treaty of 1925 between Germany and the United States. He also is very certain that "the clause may apply to every right, privilege, or immunity which the state grants in its public capacity, but not to private rights or privileges which it grants to an individual." Why cannot states apply it to the latter if they wish? One of the Japanese treaties of 1915 with China provided, "when, in future, more advantageous terms than those in existing railway loan agreements are granted to foreign financiers in connection with railway loans, the above agreement shall be again revised in accordance with Japan's wishes." Concessions to private individuals in China are clearly covered by the open door provisions of the Washington Nine Power Treaty of 1922 and the League of Nations mandates. The American protest to Great Britain in 1920 with regard to the open door in mandated areas of the Near East had reference to concessions to private oil companies. It thus seems probable that as opportunities for foreign investment by their nationals become a more important interest of states, they will make efforts to assure most-favored-nation treatment in this regard.

Among the most interesting parts of the report is the discussion of the methods employed to evade the clause by geographical discriminations,

[1] To be published later in Special Supplement to this JOURNAL.

the imposition of countervailing duties, the imposition of penalty duties, the minute classification of articles in tariff schedules, and the use of prohibitions of articles on sanitary grounds. Mr. Wickersham concludes that no line can be drawn between legitimate and illegitimate legislation of this character except that of "reasonableness." No form of the most-favored-nation clause can be made proof against subtle arguments to justify evasion. "From the example we have given—'black oils' (distinguished from yellow oils in one tariff)—it is not very far to 'goods imported by railway,' and 'salt from a country which imposes no duty on salt,' to duties on 'products from countries whose tariff schedule the president deems unreasonable'; and from there one can go on, with perfect theoretical consistency, to 'duties from countries south of the equator,' 'duties from countries whose mother-tongue is a Romance language,' or 'to monarchies whose rulers have blue eyes.'"

Thus the author despairs of an adequate rule of interpretation and concludes by urging that "in this field, as in every other realm of contract making, the parties should clearly express their meaning." "If questions arise as to their interpretation, the application of the judicial process by one of the Hague tribunals should be sought to furnish an authoritative interpretation. It would not seem either necessary or desirable, even if it were practicable, to endeavor to frame a code provision to govern the case. The ordinary rules of judicial interpretation would seem adequate and more desirable." Incidentally, he calls attention to the German-American treaty of 1925 as "a model of exact statement" on this subject.

Professor Barbosa de Magalhaes disagrees. He sees "no legal, and more particularly, no political obstacles in the way. The parties concerned should clearly express their intention; but it might happen, and indeed it would often happen, that they did not do so. Provision must be made in international law, as in municipal law, for cases in which there was no stipulation in the text, and for cases in which the text was not clear and precise. Rules to remedy this defect would be even more useful in international than in municipal law, since it was less easy to resort to a judicial procedure to settle doubts and disputes." Unfortunately he did not indicate further the type of rules he had in mind, except that they should not interfere with the "autonomy" of the state, but should "assist in the interpretation and the application of the clause."

Both writers agreed that the use of most-favored-nation clauses, after falling into disfavor immediately after the war, were again proving indispensable, though Professor Barbosa de Magalhaes's statement (extracted from the minutes of oral discussion) that this was because "it had been realized that the idea of international economic solidarity advocated in the thirteenth of President Wilson's fourteen points and contemplated in Article 23 (e) of the Covenant of the League of Nations would have to be abandoned" is, to say the least, obscure. Not the thirteenth but the third of the

fourteen points dealt with economic matters, and neither this nor Article 23 (e) of the Covenant contemplated "international economic solidarity" but "equitable treatment for the commerce" of all states in the League, a proposal which has not been abandoned, but which was reaffirmed by the International Economic Conference of 1927 and has progressed toward practical realization (since the reaction immediately following the war) by the increase in the number of most-favored-nation clauses, the conventional application of the open door to a number of areas, and the conclusion of multilateral treaties under the auspices of the League in regard to customs formalities, freedom of transit, etc.

With this tendency in mind, the present writer sees no reason why multilateral treaties might not be concluded declaring certain methods of evading most-favored-nation clauses illegitimate, and setting forth model most-favored-nation clauses with precisely defined meanings for insertion by the nations in their commercial treaties if they wish. The general treaty would impose no obligation on its signatories to utilize such model clauses, but merely to abide by their defined meaning if they did. The general ratification of such a treaty, if carefully drawn, would greatly simplify the task of diplomats in negotiating commercial treaties and of courts in interpreting them.

QUINCY WRIGHT.

INSTITUTE OF PACIFIC RELATIONS

The second meeting of the Institute of Pacific Relations was held at Honolulu, July 15 to 29, 1927. The members numbered 136, coming from the countries having interests in the Pacific. While no member represented officially the country from which he came, it was the aim of the early meetings to present a comprehensive view of the conditions in each part of Pacific area—Australia, British possessions, Canada, China, Hawaii, Japan, Korea, Philippines, United States. It was not presumed that the members of any group would have identical opinions upon the conditions and needs of the country from which they came. Each group constituted to a considerable extent a cross section of the life of the country, and each member might freely voice his views in regard to the problems of his own or of other countries.

The problems of the Pacific were not regarded as resting upon political relations merely, but as often based upon conditions which political negotiations could not modify. The arable area of Australia, while not a matter for negotiation, might be of great importance in determining the development of resources in the Pacific basin. Scientific and other research was shown to be essential in solving problems of which emigration had once been thought to be the solution. Race differences were distinguished from ideas of race superiority, and good relations among peoples were shown to rest upon acquaintance with these peoples and their problems.

The preparatory research, the results of which were available for this second session of the Institute of Pacific Relations, gave a better ground for sound discussion than was possible in the preliminary meeting in 1925. Discussions of population and food supply were checked as to facts by those who had expert knowledge upon these matters. A mass of material in the form of data papers made unnecessary discussion which might otherwise have taken place. These data papers covered a wide range of topics—Japanese art, the radio situation, naval disarmament in the Pacific, the Australian aborigines, missionary problems from the anthropological point of view, the banker in international relations, tariff autonomy in China, and many others. Here in Honolulu, behind school desks, sat leaders in many walks of life as students of the problems centering about the great ocean, while three official observers from the League of Nations closely followed the discussions. A distinguished member of one delegation expressed his thankfulness that he was not obliged to take an examination upon all the fields of study.

The second session of the Institute of Pacific Relations with its round tables, open and closed forums, addresses, and continuous conference of men and women of different civilizations and views marked a new advance in understanding of the problems of this vast area and showed that intelligent appreciation of these problems is a prerequisite to their solution. The opinion was unanimous that a third session should be held in 1929.

GEORGE GRAFTON WILSON.

THE NEUTRALITY CLAIMS AGAINST GREAT BRITAIN

On May 19, 1927, there was concluded between the United States and Great Britain an executive agreement which has been published under the title of an "arrangement effected by exchange of notes . . . for the disposal of certain pecuniary claims arising out of the recent war."[1] On examination, this "arrangement" is found to relate to a subject of special interest to governments as well as to students of international law, since it purports to provide for the final settlement, aside from certain incidental matters, of the claims of American citizens against the British Government growing out of the latter's violation, as the United States maintained, of their rights as neutrals from 1914 to 1917, before the United States, by declaring war against Germany, became a belligerent.

The four volumes of *Diplomatic Correspondence between the United States and Belligerent Governments relating to Neutral Rights and Commerce* published by our government in those years[2] are filled with protests against the war measures out of which the neutrality claims arose. The protests, taken as a

[1] Treaty Series No. 756, this JOURNAL, Vol. 21, p. 542.

[2] Also published as Special Supplements to this JOURNAL, Vols. 9 (1915), 10 (1916), and 11 (1917).

whole, relate to the alleged unlawful stoppage of trade between the United States and the countries of Europe, neutral and belligerent. They deal more particularly with seizures on the high seas of goods destined to neutral ports, with the compulsory entrance and detention of American vessels and cargoes in British ports, with indiscriminate captures at sea followed by search in port, with the extraordinary prohibitory orders known as "measures of blockade," with the extension of the so-called doctrine of continuous voyage, with the departure from the "common stock in trade" rule, with the unprecedented expansion of contraband lists, with the abolition, first virtual then express, of the category of goods "conditionally contraband," with the practical wiping out of the elementary distinction between combatants and non-combatants, with the novel interpretation of reprisal and retaliation upon neutrals, and with innumerable minor restrictions on neutral trade designed to carry these policies and measures into effect. Most of the practices mentioned were carried into execution by Orders in Council. The continued protests of Congress against these measures were ultimately embodied in resolutions or statutes (*e. g.*, the Act of Sept. 18, 1916, 39 Stat. 799, 800) conferring on the President the power of retaliation, a power which was not exercised.

Just before the United States entered the war it was stated by Secretary Lansing that the above-mentioned claims of American citizens arising out of the violation of neutral rights would be settled at the end of the war. After the war it was stated in Congress that the claims, some three thousand in number, exceeded $100,000,000 in amount, and resolutions were introduced urging their settlement. These resolutions apparently contemplated, if not a direct financial settlement of the claims, the employment of some method of adjudication, such as that provided by the existing treaty of arbitration between the two countries. The present executive agreement, however, states that the arrangement now made for the "disposal" of the claims is regarded by the United States "not as a financial settlement, but as the friendly composition of conflicting points of view which seemed to lend themselves to no other form of adjustment"; and it further declares, in its first article, that neither party "will present any diplomatic claim or request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by the other." No indication of the nature or origin of the claims of British subjects against the United States growing out of the latter's war measures is given; but as the "war measures" of the United States were adopted during the time when the two countries were "associated" in the war as belligerents, it may be inferred that the claims of British subjects do not grow out of any alleged violation by the United States of their neutral rights. The legal position on neutrality is left as follows:

> That the right of each government to maintain in the future such position as it may deem appropriate with respect to the legality or

> illegality under international law of measures such as those giving rise to [the neutrality] claims is fully reserved, it being specifically understood that the juridical position of neither government is prejudiced by the present arrangement.

As it is by this stipulation expressly agreed that, in another war, Great Britain, if belligerent, may renew the measures against which the United States protested, and that the United States, if neutral, may equally resume its attitude of protest, the situation thus created may not unnaturally give rise to certain forebodings. Numerous writers, English and American, have attributed the breakdown of the Geneva Conference to the supposed irreconcilability of view of the British and American naval authorities as to the rights of neutrals; and unless the situation, as it exists under the executive agreement, is clarified, the supposed irreconcilability may tend to become a reality.

The American claims, under the present agreement, are to be submitted to the judicial or administrative tribunals, including the prize courts, of Great Britain, and only those claims are to be paid "which the Government of the United States regards as meritorious and in which the claimants have exhausted their legal remedies in British courts, in which no legal remedy is open to them, or in respect of which for other reasons the equitable construction of the present agreement calls for a settlement." This apparently will leave the claimant dependent upon the unreviewable conclusion of the Department of State as to the merits of his claim, under tests not stated. It has been said that an examination of the claims discloses that many of them have not been pressed by the claimants, that others have been settled directly with the British Government, that others are not really owned by American citizens, that others have no merit. This is doubtless true; but whether they could, if tested by the rules of international law prevailing in 1914–1917, be scaled down to the sum of possibly $1,500,000 made available for their payment by the agreement, has been questioned.

With regard to the requirement of a resort to the British prize courts, it may be observed that, where the claim arose out of seizures or detentions under Orders in Council, the American protest was directed against the Order in Council itself, and the question therefore arises whether a British prize court would or properly could declare such Order in Council invalid. The much-cited *Zamora* (1916) 2 A. C. 77,[3] related only to *prerogative* Orders in Council, is a case unique, and had no reference to the legislative and executive Orders in Council under which the bulk of the war measures were carried into execution. The "exhaustion of local remedies" has not been considered as a mere formula, but as a measure required because it promised practical relief, making resort to diplomatic interposition premature or unnecessary. Where the international challenge is to a municipal statute or order by which the prize courts are bound, the judicial appeal for relief

[3] Printed in this JOURNAL, Vol. 10 (1916), p. 422.

from the statute or order, being futile, has not been required.[4] The reasonableness of this limitation upon the requirement is reinforced by the consideration that the expense necessarily involved in the appeal would be thrown away. After the claimant has, in conformity with the terms of the present arrangement, prosecuted his claim before the appropriate judicial or administrative tribunal of the government against which the claim is made, he may then present it to an administrative officer of his own government, for such action as such officer may see fit or be able to take. It has been stated that, so far as concerns the United States, no domestic tribunal is then to be established to examine and adjudicate the claims of its citizens, and, if this should prove to be the case, it would apparently be left to the Department of State in its discretion to distribute among numerous claimants a lump sum received from or credited to a foreign government. It has been suggested that Congress, which ultimately will have control of the fund, may provide, in the usual way, for a tribunal for its distribution. It has not been stated what claimants were contemplated by the class, "in which no legal remedy is open to them, or in respect of which for other reasons the equitable construction of the present agreement calls for a settlement."

The fund from which these American claims are to be paid comes from two possible sources. The first consists of a sum due by the United States to Great Britain of some $1,500,000 arising out of a joint account for naval supplies and services reciprocally exchanged between the two governments. The accounts were settled under a joint arbitration agreement of October 1, 1919, between the United States Navy and the British Admiralty and the balance against the United States was the sum above mentioned. This sum the British Government agrees not to demand, but permits us to allocate to the "meritorious" American claimants under the terms of the agreement. The second source consists of certain claims of the British Government against the United States Shipping Board for services rendered to and vessels used by the Board. The United States has not recognized liability for this class of claims, said to amount to some $7,000,000. The British Government, under the agreement, waives its right to press these claims. It is understood that in the event the sum of $1,500,000 proves insufficient, it will then become necessary to determine by some domestic proceeding the validity

[4] Cushing, Adm'r., *v.* United States (1886), 22 Court of Claims, 1: "Municipal law is not a measure of international responsibility, but it is binding within the jurisdiction of the state upon all its subordinate agents, including the courts. The decree in one of the cases before us, which was appealed to the civil tribunals, shows . . . that questions of treaty or international law were not ruled upon, the court being guided alone by the statutes of France. In the face of precedents of this kind, an appeal was a vain and expensive form, as an affirmation of the judgment below necessarily must follow." (p. 46.) See also *The Peggy* (1801), 1 Cranch 103, 110; Ship *Tom v.* United States (1893), 29 Ct. Cl. 68; Ship *Governor Bowdoin v.* United States (1901), 36 Ct. Cl. 338. Kane's Notes on the Commission under the treaty of July 4, 1831, with France, Moore's Arbitrations, 4472; Bark *Jones* (U. S.) *v.* Great Britain, treaty of Feb. 8, 1853, Moore's Arbitrations, 3046, 3053.

of these British claims against the Shipping Board and then to ask Congress to appropriate for the American claimants so much of the sums found to be due Great Britain as may be necessary to satisfy the American neutrality claims.

Two views have been expressed with respect to the agreement. The first is, that, since we joined Great Britain in the war and possibly ourselves adopted some of the Allied restrictions on neutral rights, we are either estopped from pressing our neutrality claims or should, as a matter of comity, have dropped them. The other is, that we are, by our original espousal of the claims and by our maintenance of the position that the measures which gave rise to them were contrary to international law, definitely committed to their adjudication or settlement by legal standards, and that, if this is not done, the United States would, as in the case of the French Spoliation claims, be open to a legitimate demand to make good the sacrifice imposed upon the claimants in the national political interest. The present arrangement appears to represent an effort on the part of the Executive to effect a compromise or reconciliation between these conflicting views. But, as the arrangement requires appropriations by Congress, the various questions involved in it probably will be debated there.

EDWIN M. BORCHARD.

L'INSTITUT INTERNATIONAL DE DROIT PUBLIC

In June, 1927, there was organized at Paris, by a group of distinguished jurists representing eight different countries, a new international scientific association which bears the title *L'Institut International de Droit Public.* According to its statutes, the object of the Institute is "scientific work in the domain of public law and political science, the theoretical study of problems of public law—constitutional law, administrative law, international public law in its relations with internal public law,—the elaboration of methods, the affirmation of general principles, comparison and evaluation of national doctrines, with a view to the development of individual liberty by means of juridical principles, in the different states." The *siège social* of the Institute is at the Faculty of Law of the University of Paris. The statutes provide for two classes of members: (1) titulary members and (2) associate members. The founders of the Institute, actually 19, are titulary members as of right. The total number of titulary members is limited to forty and the number of associate members to fifty. Titulary members are elected from among the associates by the general assembly of titulary members; associate members are chosen from among scholars of the entire world who are known by their scientific activity in the fields of public law and political science and are elected by secret ballot by the general assembly of titulary members. The present membership consists of thirty-eight titulary and fourteen associate members. Among the former are a number of American

jurists: James Brown Scott, F. J. Goodnow, A. L. Lowell, W. F. Willoughby, E. S. Corwin, Ernst Freund, Roscoe Pound, and William H. Taft; among the latter are John A. Fairlie, James W. Garner and Leonard White.

M. Gaston Jèze, Professor of Law in the University of Paris and editor of the *Revue du Droit Public et du la Science Politique*, was elected President of the Institute.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16, 1927–AUGUST 15, 1927
(With references to earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of international news; *C. A. P.*, Collection of Advisory Opinions of Permanent Court of International Justice; *C. J.*, Collection of Judgments of the Permanent Court of International Justice; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Cur. Hist.*, Current History (New York Times); *E. E. P. S.*, European Economic and Political Survey; *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *F. P. A. I. S.*, Foreign Policy Association Information Service; *G. B. Treaty Series*, Great Britain, Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *I. L. R.*, International Labor Review; *J. O.*, Journal Official (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series; *Nation* (*N. Y.*); *P. A. U.*, Pan American Union Bulletin; *Press notice*, U. S. State Dept. press notice; *Rev. int. de la Croix-Rouge*, Revue international de la Croix-Rouge; *R. J. I. L. A.*, Revue Juridique Internationale de la Locomotion Aérienne; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London). *U. S. C. R.*, U. S. Commerce reports.

December, 1926

23 FRANCE—TURKEY. Commercial agreement signed at Aleppo. *U. S. C. R.*, Aug. 8, 1927, p. 375.

January, 1927

13 GERMAN REPARATIONS. Agreement signed by principal Allied and Associated Powers regulating amounts to be allocated out of annuities of Experts Plan for the armies of occupation, the Rhineland high commission, and the Military commission of control to Jan. 10, 1930. *G. B. Misc. Series*, no. 3 (1927), *Cmd.* 2886.

29 ALBANIA—GREAT BRITAIN. Exchanged ratifications of extradition treaty signed at Tirana, July 22, 1926. *G. B. Treaty Series*, no. 20 (1927), *Cmd.* 2920.

February, 1927

2 BULGARIA—GREECE. Temporary most-favored-nation commercial treaty signed in Athens. *U. S. Daily*, June 11, 1927, p. 9.

24 CHILE—ITALY. Signed treaty of arbitration to last ten years. *P. A. U.*, July, 1927, p. 720.

March, 1927

19 PERSIA—POLAND. Signed treaties of friendship and commerce. *U. S. C. R.*, Sept. 12, 1927, p. 695.

24 ALBANIA—CZECHOSLOVAKIA. Temporary trade agreement signed Jan. 19, 1926, came into force. *U. S. C. R.*, Sept. 5, 1927, p. 630.

24 BELGIUM—SIAM. Most-favored-nation commercial treaty signed July 13, 1926, came into force. *U. S. C. R.*, June 13, 1927, p. 687.

29 GREAT BRITAIN—LITHUANIA. Exchanged ratifications of extradition treaty signed May 18, 1926. Text: *G. B. Treaty Series*, no. 15 (1927), *Cmd.* 2897.

April, 1927

6 CHINA—RUSSIA. Soviet embassy in Peking sent note to Minister of Foreign Affairs of Peking Government concerning invasion of embassy compound on that

day. On April 9, M. Litvinov, Assistant Commissar for Foreign Affairs of the Soviet Union, sent supplementary note to Chinese *Chargé d'Affaires* in Moscow. Texts: *Soviet Union R.*, June, 1927, p. 97. *China Weekly R.*, May 14, 1927, p. 280.

27 GERMANY—NORWAY. Agreement for preferential tariff rate on canned fish arranged by exchange of notes. *U. S. C. R.*, Aug. 1, 1927, p. 309.

30 CANADA—WEST INDIES. Trade agreement of 1925 came into force by proclamation of governor of British Guiana. *U. S. C. R.*, June 20, 1927, p. 754.

May, 1927

2–19 INTER-AMERICAN COMMERCIAL AVIATION COMMISSION. Organized in Washington by delegates from 16 Pan American countries, who agreed upon resolution to be submitted to Governing Board of Pan American Union. Text: *P. A. U.*, Aug., 1927, p. 751.

4–24 INTERNATIONAL ECONOMIC CONFERENCE. Held at Geneva, with 47 nations represented. Final report: *L. N. M. S.*, June 15, 1927. *Cur. Hist.*, July, 1927, *26;* 580.

6 BALTIC AND WHITE SEA CONFERENCE. Held in Paris. Resolutions: *L. N. Q. B.*, July, 1927, p. 706.

11 PAN AMERICAN CONFERENCE ON UNIFORMITY OF SPECIFICATIONS. Resolutions approved by second conference. Text: *P. A. U.*, Aug., 1927, p. 759.

12–28 GREAT BRITAIN—RUSSIA. On May 12, British police raided premises of Arcos, Ltd., Soviet trade delegation. *Nation* (N. Y.), June 15, 1927, p. 677. On May 12 and 17, Soviet *Chargé d'Affaires* in London and the Russian Foreign Office addressed protests to British Government against this violation of trade agreement of 1921. Text: *Soviet Union R.*, June, 1927, p. 94. British note of May 27 announced severance of diplomatic relations. Text: *Times*, May 28, 1927, p. 12. Soviet reply handed to British mission at Moscow on May 28. *Times*, May 30, 1927, p. 14. Text: *Soviet Union R.*, July–Aug., 1927, p. 114. *Europe*, June 18, 1927, p. 807.

15 ALBANIA—ITALY. Issued mutual declaration of policy concerning questions arising out of pact of friendship signed at Tirana Nov. 27, 1926. *N. Y. Times*, May 15, 1927, p. 9.

19 GREAT BRITAIN—UNITED STATES. Agreement for settling unadjusted claims arising out of World War effected by exchange of notes. Text: *U. S. Daily*, June 2, 1927, p. 1. *Press notice*, May 31, 1927. Text: *U. S. Treaty Series*, no. 756. *G. B. Treaty Series*, no. 14 (1927), *Cmd.* 2877.

21 BELGO-LUXEMBURG ECONOMIC UNION—ESTONIA. Exchanged ratifications of most-favored-nation commercial treaty signed Sept. 28, 1926. *U. S. C. R.*, Aug. 15, 1927, p. 437.

21 BRAZIL—PARAGUAY. Boundary treaty signed at Rio de Janeiro. *B. I. N.*, May 30, 1927, p. 9.

23 FRANCE—ITALY. Modifications to certain commercial treaties in force between the two countries, signed at Rome May 29, 1926, promulgated in France. *J. O.*, May 26, 1927, p. 5491.

25 CENTRAL AMERICAN PACT. Guatemala, Honduras and Salvador signed convention at San Salvador in which the three republics agreed not to consider singly or separately problems affecting the general interests of Central America, before a previous exchange of ideas. A regular annual meeting of the Ministers of Foreign Affairs of the three republics is provided for in the convention, which was approved by the Presidents of all three countries on June 4. *P. A. U.*, Sept., 1927, p. 930. Texts: *D. O.* (Salvador), *Gaceta* (Honduras), *Guatemalteco*, June 4, 6, 8, 1927, respectively.

25 ICELAND—RUSSIA. Signed most-favored-nation commercial agreement. *U. S. C. R.*, Aug. 29, 1927, p. 566.

25 SPAIN—UNITED STATES. Royal decrees issued in Spain granting most-favored-nation treatment to the United States for six months from May 26, 1927. *Press notice*, May 26, 1927.

27 GREECE—SWEDEN. Exchanged ratifications of most-favored-nation commercial treaty signed Sept. 10, 1926. *U. S. C. R.*, July 25, 1927, p. 248.

28 BULGARIAN DISARMAMENT. Conference of Ambassadors notified Bulgaria that Interallied Commission of Military Control would be withdrawn on May 31. *Times*, May 30, 1927, p. 13.

28 *to July 26* PERMANENT COURT OF INTERNATIONAL JUSTICE. On May 28, Greece filed new application, instituting proceedings against British Government with regard to Mavromatis concessions. *L. N. M. S.*, June 15, 1927, p. 132. On June 15, Court convened for twelfth session, with five cases on its list. *L. N. M. S.*, July 15, 1927. On June 18, Court issued order embodying its decision to grant extension of time to Feb. 15, 1928 for filing written proceedings in the case between Belgium and China concerning termination by China of Sino-Belgian treaty of Nov. 2, 1865. *C. J.*, no. 8. On July 26, delivered judgment in Chorzow factory case. Polish plea dismissed, and suit instituted by Germany retained for consideration upon its merits. *L. N. M. S.*, Aug. 15, 1927, p. 212.

30 *to June 14* EGYPT—GREAT BRITAIN. Exchanged notes on subject of army administration in Egypt. *Times*, May 31, June 4 and 14, 1927, p. 16.

June, 1927

1 GREECE—ITALY. Exchanged ratifications of most-favored-nation commercial agreement of Nov. 24, 1926. *U. S. C. R.*, July 18, 1927, p. 184.

2 LATVIA—RUSSIA. Signed trade agreement for period of five years. *U. S. C. R.*, June 20, 1927, p. 754. *Soviet Union R.*, July-Aug., 1927, p. 116.

5 ALBANIA—SERBIA. Diplomatic relations broken off on June 5 by Serbia, following exchange of notes. *Times*, June 6 and 8, 1927, pp. 10 and 12. *F. P. A. I. S.*, June 22, 1927.

6 FRANCE—HAITI. Exchanged ratifications of commercial treaty of July 29, 1926. Text: *J. O.*, July 24, 1927, p. 7690. *U. S. Daily*, Sept. 14, 1927, p. 9.

7 INTERNATIONAL COLONIAL INSTITUTE. Opened 19th congress at the Hague Peace Palace with ten countries represented. *Times*, June 8, 1927, p. 11.

7–12 POLAND—RUSSIA. Exchange of notes took place relative to assassination on June 7 of M. Voikoff, representative of Soviet Union in Poland. *Times*, June 8–13, 1927, pp. 12, 13, 14. *Soviet Union R.*, July-Aug., 1927.

8–10 INDUSTRIAL PROPERTY. International Association for Protection of Industrial Property held conference at Geneva. Resolutions: *L. N. Q. B.*, July, 1927, p. 719.

10 GERMAN REPARATIONS. Agent General for Reparation Payments issued interim report. Summary: *E. E. P. S.*, June 30, 1927, p. 665. *U. S. Daily*, July 1, 1927, p. 7.

12 GERMANY—PERSIA. Commercial treaty of June 12, 1873 terminated by Persia. *U. S. C. R.*, Aug. 1, 1927, p. 309.

13 CODIFICATION OF INTERNATIONAL LAW. Committee of Experts submitted reports to Council on subjects ripe for international regulation, and recommendations for an international conference to consider the questions. *L. N. O. J.*, July, 1927, p. 749.

13–17 LEAGUE OF NATIONS COUNCIL. Held 45th session to discuss disarmament and security and the results of the economic conference. Adopted report of Committee of Experts for Codification of International Law. *L. N. M. S.*, July 15, 1927. *L. N. O. J.*, July, 1927.

15 ARMS TRAFFIC. Special commission for preparation of draft convention on private manufacture of arms and ammunition submitted report to League Council. Text of report and draft: *L. N. O. J.*, July, 1927, p. 858.

16 INTERNATIONAL LABOR CONFERENCE. Closed 10th annual session at Geneva, and adopted two draft conventions dealing with sickness insurance for workers in industry and commerce, domestic servants, and agricultural workers. *I. L. R.*, Aug., 1927. Draft convention and recommendations adopted: *I. L. O. B.*, July 31, 1927.

17 BULGARIA—GREAT BRITAIN. Signed agreement relating to provisional dissolution of Anglo-Bulgarian mixed arbitral tribunal. *G. B. Treaty Series*, no. 21 (1927), *Cmd.* 2928.

20 CZECHOSLOVAKIA—ESTONIA. Most-favored-nation commercial treaty signed at Riga. *U. S. C. R.*, Aug. 1, 1927, p. 309.

24 GREAT BRITAIN—LATVIA. Signed agreement relating to tonnage measurement certificates. Text: *G. B. Treaty Series*, no. 17 (1927), *Cmd.* 2911.

27 *to* July 2 INTERNATIONAL CHAMBER OF COMMERCE. Held fourth congress in Stockholm. *E. E. P. S.*, Aug. 15, 1927, p. 761. Review of proceedings; *U. S. Daily*, Aug. 8, 1927, p. 1.

30 FRANCE—GERMANY. Temporary commercial agreement of Aug. 5, 1926, expired. *U. S. C. R.*, July 25, 1927, p. 249.

30 FRANCE—GERMANY. Signed arrangement at Paris for prolongation of commerce between Saar Territory and Germany. Text: *J. O.*, July 14, 1927, p. 7271.

July, 1927

1 ALBANIA—AUSTRIA. Provisional most-favored-nation commercial agreement came into force. *U. S. C. R.*, Aug. 29, 1927, p. 565.

4–12 INTERNATIONAL RELIEF UNION. Conference held at Geneva, under auspices of League of Nations, approved convention and statute establishing an international union for relief of populations stricken by disaster. Convention signed by 13 nations. *U. S. Daily*, Aug. 2, 1927, p. 1. *L. N. M. S.*, Aug. 15, 1927, p. 229.

9 AUSTRIA—HUNGARY. Agreement signed amending existing commercial treaty. *U. S. C. R.*, Aug. 15, 1927, p. 437.

14–23 GERMAN DISARMAMENT. Belgium and Germany exchanged notes regarding declarations of Belgian Senate on certain failures of Germany to fulfil military obligations she had assumed. On July 22, Conference of Ambassadors transmitted report made by the Interallied Military Control Commission at the close of its functions on Jan. 31, 1927. *E. E. P. S.*, July 30 and Aug. 15, 1927, pp. 728 and 767.

15 CUBA—SPAIN. Commercial most-favored-nation treaty signed at Madrid. *U. S. C. R.*, Sept. 5, 1927, p. 630.

15–28 INSTITUTE OF PACIFIC RELATIONS. Second biennial conference held in Honolulu. *R. R.*, Sept., 1927, p. 295. *I. P. R. News B.*, Aug., 1927.

15 PERSIA—UNITED STATES. Commercial treaty of 1856, which accords extraterritorial privileges to Americans in Persia, denounced by Persia to terminate May 10, 1928. *C. S. Monitor*, July 16, 1927, p. 2.

19 BELGIUM—SPAIN. Treaty of conciliation, judicial settlement and arbitration signed in Brussels. *B. I. N.*, July 23, 1927, p. 8.

20 GERMANY—JAPAN. Signed most-favored-nation commercial treaty at Tokyo. *U. S. C. R.*, Aug. 1, 1927, p. 309. Summary: *Europe*, Aug. 6, 1927, p. 1034.

22 GERMANY—TURKEY. Most-favored-nation commercial treaty of Jan. 12, 1927, came into force. *U. S. C. R.*, Aug. 22, 1927, p. 503.

23 GENERAL CLAIMS COMMISSION (United States and Mexico) closed last session. Of 51 American claims heard and decided during its existence, awards were made in 36. Of 9 Mexican claims heard and decided, awards were made in 5. *Press notice*, Aug. 16, 1927.

26 GREAT BRITAIN—HUNGARY. Exchanged ratifications of treaty of commerce and navigation signed July 23, 1926. *G. B. Treaty Series*, no. 23 (1927), *Cmd.* 2933.

29 GREAT BRITAIN—JAPAN. Exchanged ratifications of supplementary convention to treaty of commerce and navigation signed July 30, 1925. *G. B. Treaty Series*, no. 22 (1927), *Cmd.* 2931.

August, 1927

1–4 INTERNATIONAL MARITIME COMMITTEE. Held conference in Amsterdam to discuss draft convention for compulsory insurance of passengers at sea, clean bills of lading, etc. *Times*, Aug. 2–5, 1927, p. 9.

4 NAVAL CONFERENCE. Tri-Power conference of Great Britain, Japan and the United States for limitation of naval armaments, which opened in Geneva on June 20, ended on Aug. 4 with a plenary session in which a joint statement was made, reviewing work of conference and reasons for its failure. *N. Y. Times*, Aug. 5, 1927, p. 1. *U. S. Daily*, Aug. 5, 1927, p. 1. *Press notice*, Aug. 4, 1927. *Cur. Hist.*, Sept., 1927, *26*: 945. *Round Table*, Sept., 1927, p. 659. This JOURNAL, *supra*, p. 757.

8 CZECHOSLOVAKIA—HUNGARY. Commercial convention signed May 31, 1927, came into force. *U. S. C. R.*, Aug. 15, 1927, p. 437.

9 GREAT BRITAIN—SERBIA. Agreement for funding Jugoslav war debt to Great Britain signed. *C. S. Monitor*, Aug. 10, 1927, p. 1. *E. E. P. S.*, Aug. 15, 1927, p. 768.

10 AUSTRIA—CZECHOSLOVAKIA. New tariff convention replacing reciprocal convention which expired on April 15, 1927, came into force. *U. S. C. R.*, Aug. 15, 1927, p. 437.

13 GREAT BRITAIN—UNITED STATES. Notes exchanged Jan. 4 and Feb. 23, for reciprocal agreement on return of American and British property seized in war time under trading with enemy acts, made public. Text: *U. S. Daily* Aug. 15, 1927, p. 1. *Press notice*, Aug. 13, 1927.

15 OTTOMAN PUBLIC DEBT. Announcement made that basis of agreement had been reached by bondholders and Turkish Government for settlement of debt. *E. E. P. S.*, Aug. 15, 1927, p 767.

INTERNATIONAL CONVENTIONS

AERIAL NAVIGATION. Paris, Oct. 13, 1919.
Adhesion: Saar Territory. April 28, 1927. *R. J. I. L. A.* July-Aug., 1927, p. 361.

COPYRIGHT UNION. Revision. Berne, Nov. 13, 1908. Protocol. Berne, Mar. 20, 1914.
Adhesion: Estonia. Mar. 31, 1927. *Droit d'Auteur*, Aug. 15, 1927, p. 89.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.
Ratifications:
France. Sept. 13, 1926. *L. N. O. J.*, May, 1927, p. 616.
Greece. *L. N. M. S.*, Aug. 15, 1927, p. 217.

EIGHT HOUR DAY. Washington, Nov. 28, 1919.
Ratification: France. June 2, 1927. *L. N. O. J.*, June, 1927, p. 678.

EMPLOYMENT OF CHILDREN AT SEA. Genoa, July 9, 1920.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 617.

EMPLOYMENT OF CHILDREN IN INDUSTRY. Washington, Nov. 28, 1919.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 617.

EMPLOYMENT OF YOUNG PERSONS AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 617.

EPIZOÖTIC OFFICE. Paris, Jan. 25, 1924.
Ratification deposited: Rumania. July 16, 1927. *J. O.*, July 23, 1927, p. 7618.

FREEDOM OF TRANSIT. Barcelona, April 20, 1921.
Ratification: Belgium. May 16, 1927. *L. N. O. J.*, June, 1927, p. 677.

GERMAN PEACE TREATY. Versailles, June 28, 1919.
Amendment to Art. 393. Geneva, Nov. 2, 1922.
Ratifications:
Greece. June 8, 1927. *I. L. O. B.*, July 31, 1927, p. 119.
Serbia. Mar. 11, 1927. *I. L. O. B.*, May 15, 1927, p. 95. *L. N. O. J.*, May, 1927, p. 616.

MARITIME PORTS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Ratification: Belgium. May 16, 1927. *L. N. O. J.*, June, 1927, p. 677.

MATERNITY CONVENTION. Washington, Nov. 29, 1919.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 616.

MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 617.

NIGHT WORK OF WOMEN. Washington, Nov. 28, 1919.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 616.

NIGHT WORK OF YOUNG PERSONS. Washington, Nov. 28, 1919.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 617.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.
Adhesion: Bermuda, Bahamas, Falkland Islands, St. Helena, Palestine, Transjordan. May 23, 1927. *L. N. O. J.*, June, 1927, p. 677.
Ratifications:
Czechoslovakia. April 11, 1927.
Poland. Mar. 8, 1927. *L. N. O. J.*, May, 1927, p. 615.

OPIUM AGREEMENT. Protocol. Geneva, Feb. 11, 1925.
Ratifications:
Netherlands. Mar. 1, 1927. *L. N. O. J.*, May, 1927, p. 615.
Siam. May 6, 1927. *L. N. O. J.*, June, 1927, p. 678.

OPIUM CONVENTION. Geneva, Feb. 19, 1925.
Ratifications:
Bulgaria. Mar. 9, 1927.
Czechoslovakia. April 11, 1927. *L. N. O. J.*, May, 1927, p. 615.
France. June 19, 1927. *J. O.*, June 22, 1927, p. 6394.

OPIUM CONVENTION. Protocol. Geneva. Feb. 19, 1925.
Ratification: Salvador. May 24, 1926. *P. A. U.*, July, 1927, p. 721.

OPIUM CONVENTION. The Hague, Jan. 23, 1912.
Promulgation: Mexico. Feb. 25, 1927. *P. A. U.*, July, 1927, p. 721.

PAN AMERICAN SANITARY CODE. Havana, Nov. 14, 1926.
Ratification: Salvador. May 27, 1926. *P. A. U.*, July, 1927, p. 721.

PARCEL POST CONVENTION. Mexico, Nov. 9, 1927.
Ratifications:
Argentina.
Ecuador. *U. S. Daily*, Aug. 15, 1927, p. 12.
Dominican Republic. April 13, 1927.
Panama. May 17, 1927. *P. A. U.*, Sept., 1927, p. 931.
United States. May 5, 1927. *Pan Amer. postal union*, 1927.

PARCEL POST CONVENTION. Stockholm, Aug. 28, 1924.
Ratification: Venezuela. *P. A. U.*, Aug., 1927, p. 827.

POSTAL CONVENTION AND PROTOCOL. Mexico, Nov. 9, 1927.
Ratifications:
Argentina, Cuba, Ecuador. *U. S. Daily*, Aug. 15, 1927, p. 12.
Dominican Republic. April 13, 1927. *P. A. U.*, Sept., 1927, p. 930.
United States. May 5, 1927. *Pan Amer. postal union*, 1927.

RAILWAYS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Ratification: Belgium. May 16, 1927. *L. N. O. J.*, June, 1927, p. 677.

RIGHT TO A FLAG OF STATES HAVING NO SEA COAST. Barcelona, April 20, 1921.
Ratification: Belgium. May 16, 1927. *L. N. O. J.*, June, 1927, p. 677.

SLAVERY CONVENTION. Geneva, Sept. 25, 1926.
Ratifications:
Bulgaria. Mar. 9, 1927. *L. N. O. J.*, May, 1927, p. 615.
Great Britain. June 18, 1927. *G. B. Treaty Series*, no. 16 (1927).
Denmark. *L. N. O. J.*, June, 1927, p. 678.
Signatures:
Colombia. Mar. 2, 1927.
Italy. Mar. 9, 1927.
Liberia. Mar. 31, 1927.
Poland. Mar. 8, 1927.
Spain. Mar. 3, 1927.
Sweden. Mar. 28, 1927. *L. N. O. J.*, May, 1927, p. 615. *G. B. Treaty Series*, no. 16, (1927).

UNEMPLOYMENT CONVENTION. Washington, Nov. 28, 1919.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 616.

UNIVERSAL POSTAL CONVENTION. Stockholm, Aug. 28, 1924.
Ratification: Venezuela. *P. A. U.*, Aug., 1927, p. 827.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 617.

WORKMEN'S COMPENSATION FOR ACCIDENTS. Geneva, June 10, 1927.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 617.

WORKMEN'S COMPENSATION FOR ACCIDENTS. (Equality of Treatment). Geneva, June 5, 1925.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 617.

WORKMEN'S COMPENSATION FOR OCCUPATIONAL DISEASES. Geneva, June 10, 1925.
Ratification: Serbia. April 1, 1927. *L. N. O. J.*, May, 1927, p. 617.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

GENERAL CLAIMS COMMISSION—UNITED STATES AND MEXICO*

JOSEPH E. DAVIES *v.* MEXICO (Docket No. 1232)

Opinion rendered March 23, 1927

Claim for legal services for four years from October 1, 1920, at the rate of $50,000 per year, under a contract with R. V. Pesqueira, Financial Agent of the Government of Mexico in the United States. The letter of October 11, 1920, embodying the contract contained the following clause: "As I have explained to you, this contract is limited by one reservation. My authorization proceeds from President de la Huerta and I have no present power to bind the incoming administration of President Obregón." Pesqueira's service terminated in November, 1920, shortly before General Obregón assumed the presidency of Mexico on December 1, 1920, and the Commission found no convincing evidence that his administration recognized the contract of four years' duration and availed itself of the claimant's services. Hence it was immaterial that claimant did not receive written notice of the termination of the contract as provided in Pesqueira's letter of October 11, since Pesqueira was without authority to bind President Obregon's administration to give such notice. Contract held to be binding on the Mexican Government during the period of the administration of Provisional President Adolfo de la Huerta, and claimant awarded $50,000 compensation for the first year which was payable in advance under the contract, less $30,000 paid on account in three installments on October 20 and December 7, 1920, and June 19, 1922, with interest at 6% per annum on the unpaid balances from October 20, 1920.

MARGARET ROPER *v.* MEXICO (Docket No. 183)

Opinion rendered April 4, 1927

Mexico held responsible for unlawful acts of police in firing their pistols to prevent American seamen from returning to their ship and who, as the result of such firing, jumped into the river and were drowned.

An investigation instituted by the district judge, who eighteen minutes later reached the conclusion that there was no crime to prosecute, may have complied with all the forms of Mexican law, but the occurrences pointing clearly to the commission of crime were not adequately met by that investigation.

The well-known declarations of international tribunals and of authorities on international law with regard to the respect due to a nation's judiciary are not applicable to the functions exercised by a judge in making an investigation to determine whether there should be a prosecution, as such functions are not judicial in the sense in which that term is so used.

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* Established in pursuance of the convention between the United States and Mexico signed September 8, 1923. C. van Vollenhoven, Presiding Commissioner; Fred K. Nielsen, Commissioner; G. Fernández MacGregor, Commissioner.

Headnotes, footnotes, and summaries, supplied by the Managing Editor of the JOURNAL.

Counsel: United States, Bert L. Hunt; Mexico, Francisco A. Ursúa.

1. Claim for damages in the amount of $17,000 is made in this case by the United States of America against the United Mexican States on behalf of Margaret Roper on account of the death of her son, William Roper, who was drowned in the Pánuco river, at Tampico, Tamaulipas, Mexico, on March 10, 1921, as a result—it is alleged in the American memorial—of an assault upon him and three fellow seamen, S. Weston Brown, Ernest Small, and O. Griffin, committed by Mexican policemen and Mexican private citizens. It is stated in the memorial that the seamen, when assaulted, jumped into the water to escape by swimming to their ship, the American merchant vessel *Saxon*, and that Roper was wounded by a pistol shot and sank immediately after having been heard to utter cries of distress. In behalf of the United States it is contended that Mexico is responsible for the unlawful acts of Mexican policemen; for the failure of Mexican authorities to afford proper protection to the unfortunate Americans; and for a denial of justice growing out of the failure of Mexican authorities to prosecute the persons implicated in the crime committed against the seamen.

2. It is difficult to reach a definite conclusion with regard to the precise character of all the occurrences connected with the death of the seamen, but certain things appear to be clearly shown by the record: Roper, Brown, and Small, American citizens, and Griffin, whose nationality does not clearly appear from the record, all members of the crew of the *Saxon*, obtained shore leave on the evening of March 10th when the vessel was lying at anchor in the river about a mile distant from the water front at Tampico. When about 10 o'clock p. m. the men reached a boat in which they intended to proceed to the steamer, a Mexican, Florencio González, who either for some time had been following them or suddenly came upon them, tried to prevent them from leaving. After three of the seamen, Roper, Brown, and Griffin, had entered the boat, other persons arrived. During a confusion of some kind, the four seamen leaped into the water. Pistol shots were fired, and Roper appears to have been wounded. Griffin, instead of endeavoring to swim to the *Saxon*, hid behind a lighter and escaped death. The captain of the *Saxon* shortly after 10 o'clock p. m. heard shots and cries and saw swimming toward the vessel two men, one of whom cried out twice: "It is Willie Roper, I am wounded, save me"—or words to that effect. Both men sank before assistance could be given to them. Three days after the occurrences in question the bodies of Brown and Small were found, but Roper's body appears not to have been located. Brown's corpse was in a complete state of decomposition. Medical certificates produced before the judge at Tampico would seem to indicate that Brown and Small were not wounded. As heretofore observed, it is difficult to reach a definite conclusion with regard to the precise character of all the occurrences connected with the death of the seamen. Parts of the evidence in the record before the Commission are conflicting. From some of the evidence which is available to

the Commission, mainly that furnished by the seaman Griffin, it appears that González, desiring to prevent the seamen from leaving for their vessel, blew a whistle which brought four or five companions who were nearby in the dark; that one of these men assaulted the seaman Small and felled him on the shore; and that pistol shots were directed against the seamen who leaped into the water to save themselves, whereupon the policemen without endeavoring to ascertain what became of the seamen departed with the other Mexicans.

3. The District Judge at Tampico instituted an investigation in the early part of March, 1921, and according to evidence given before the judge by the Mexican policeman and other Mexican citizens, the occurrences in question were substantially as follows: On the evening of March 10th a half naked American citizen accosted these Mexicans and stated that he had been robbed and deprived of his clothing by some negroes. One of the Mexican citizens (González) proceeded to the river bank and found four negroes about to embark in a boat, whereupon he undertook to detain them. Two of the men went to bring two policemen, one of whom, when he arrived, fired shots into the air to intimidate the four negroes, who jumped into the water in order to escape arrest. On the basis of the evidence produced before him, the District Judge at Tampico, in an opinion which he rendered on September 9, 1922, about 18 months after the investigation was instituted, reached the conclusion that it did not appear that there was any crime to prosecute in connection with the death of the American seamen. In this opinion the judge also declared that there was no crime to prosecute in connection with a supposed assault committed by the seamen against the person described as a half naked American who declared that he had been robbed. This latter conclusion we think was undoubtedly sound, and we are of the opinion that if there had been reason to suspect the seamen of wrongdoing they might have been arrested without any firing of pistols or indeed without any forcible measures. It would appear that the best service the policemen might have rendered would have been to deal in a proper way with the difficulties between the seamen and the private Mexican citizens who interfered with the departure of the seamen for their vessel. The evidence appears to be conclusive that shots were fired, and there is uncontradicted testimony that at least one policeman, Cristóbal Pérez, made use of his weapon. It is also clear that pistol fire was largely, if not entirely, responsible for the action of the men in leaping into the river where they met their death. The evidence of the captain of the *Saxon* makes it reasonably certain that Roper was shot, or in any event, that he was fired upon by the police. In view of the things of this kind concerning which the record before us leaves no doubt in our minds, we are constrained to reach the conclusion that had it not been for the unlawful acts of the police the seamen would not have met their death. Even though the police had fired, as was testified before the judge at Tampico simply to "intimidate" the seamen, such action must be regarded by the

Commission as improper in the light of the principles underlying the Commission's decisions in the Swinney case, Docket No. 130, the Falcón case, Docket No. 278, and the Teodoro García case, Docket No. 292.[1] In the opinions rendered in those cases the Commission discussed the reckless and unnecessary use of firearms by persons engaged in the enforcement of law.

4. It was argued in behalf of Mexico in the instant case that the Mexican Government is not responsible under international law for the acts of such minor officials as policemen. This question received consideration in the Quintanilla case, Docket No. 532,[2] in which the Mexican Government contended that the Government of the United States was responsible for the acts of a deputy sheriff in Texas, and in which an award was rendered by the Commission in favor of the claimant. Considering the acts of the policemen in the present case in relation to the seamen, and in relation to the Mexican citizens who undertook to prevent the seamen from joining their vessel, we are of the opinion that the Mexican Government must be held responsible for the acts of the policemen. And with respect to this point we deem it particularly important to consider the comprehensive scope of Article I of the Convention of September 8, 1923, which is concerned with the jurisdiction of the Commission. In addition to a description of claims, in language similar to that frequently employed in claims conventions, there is found this additional description: "and all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice."

5. In support of the contentions made in behalf of the United States with respect to a denial of justice, it was alleged that there should have been a prosecution of Mexicans who appeared to be implicated in the deaths of the seamen, and that the investigation before the judge at Tampico was of such a character as to reveal a purpose to exculpate those persons. This official may have complied with all the forms of Mexican law in conducting the investigation, as it was argued in behalf of Mexico he did. But we do not consider that occurrences pointing clearly to the commission of crime were adequately met by this investigation.

6. Three American citizens lost their lives under most unusual circumstances. There is evidence that some Mexican private citizens and some Mexican policemen undertook to prevent the American seamen from joining their vessel after the latter had been on shore leave. There is evidence given by one of the seamen who managed to preserve his life that one of his companions was felled by a blow on the head; that shots were fired at others who had entered a boat in which they intended to depart for their vessel; and that they leaped into the water to escape. During the course of an investigation of the death of the seamen before the judge at Tampico, three private Mexican citizens testified to the effect that they were approached by a half

[1] Printed in this JOURNAL, July, 1927 (Vol. 21), pp. 562, 566, and 581.

[2] Printed, *ibid.*, p. 568.

naked American citizen and were informed by him that he had been assaulted and robbed by negroes who were at the time near the river. These men further testified that one of them proceeded to the river bank and found four negroes about to embark in a boat whereupon he undertook to detain them; that two of the men went to bring two policemen, one of whom, when he arrived, fired shots into the air to intimidate the seamen, who jumped into the water.

7. From testimony given by Mexicans, it appears that the half naked American who had so persistently sought to obtain the arrest of negroes who had assaulted him, suddenly disappeared at the time when his presence would have been most important for the consummation of his purpose of obtaining redress. It is strange that such an important witness should not have been located by Mexican authorities. There would seem to be good reason to suppose that he could easily have been found, if he were a reality. He was strikingly identified by several persons who gave testimony before the Mexican Judge, and it was testified that he could speak some Spanish.

8. The Commission believes that it has mentioned enough things shown by the record upon which to ground the conclusion that the occurrences in relation to the death of these American seamen were of such a character that the persons directly concerned with them should have been prosecuted and brought to trial to determine their innocence or guilt with respect to the death of the Americans. The conclusions of the judge at Tampico with respect to the investigation conducted by him were treated in oral and in written arguments advanced in behalf of the Mexican Government as the judgment of a judicial tribunal. And the well known declarations of international tribunals and of authorities on international law with regard to the respect that is due to a nation's judiciary were invoked to support the argument that the Commission could not, in the light of the record in the case, question the propriety of the judge's finding. In considering that contention, we believe that we should look to matters of substance rather than form. We do not consider the functions exercised by a judge in making an investigation whether there should be a prosecution as judicial functions in the sense in which the term judicial is generally used in opinions of tribunals or in writings dealing with denial of justice growing out of judicial proceedings. It may readily be conceded that actions of the judge should not be characterized by this Commission as improper in the absence of clear evidence of their impropriety. Obviously, however, the application of rules or principles asserted by this Commission in the past with respect to denials of justice will involve widely varying problems. To undertake to pick flaws in the solemn judgments of a nation's highest tribunal is something very different from passing upon the merits of an investigation conducted by an official—whether he be a judge or a police magistrate—having for its purpose the apprehension or possible prosecution of persons who may appear to be guilty of crime.

9. The Commission, considering among other things the earning capacity of the deceased and the financial support he gave the claimant, is of the opinion that an award of $6,000 may properly be made in this case.

10. The Commission therefore decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of the claimant, the sum of $6,000 (six thousand dollars) without interest.

Done at Washington, D. C., this 4th day of April, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.

FRED K. NIELSEN,
Commissioner.

G. FERNÁNDEZ MACGREGOR,
Commissioner.

MAMIE BROWN *v.* MEXICO (Docket No. 182)

DAISY SANDERS AND ROSETTA SMALL *v.* MEXICO (Docket No. 184)

Opinions rendered April 4, 1927

Award of $8,000 made in the Brown case, and award of $5,000 made in the Sanders and Small case, upon the same facts and for the same reasons as in the Roper case, *supra.*

JENNIE L. CORRIE *v.* MEXICO (Docket No. 1310)

Opinion rendered April 4, 1927

Motion to rectify American memorial by substituting Alexander St. J. Corrie, the name of father of the deceased American seaman on account of whose killing the claim is made, for the name of the mother of the deceased, who had died on June 21, 1921, and whose death was unknown to the American Agency when it filed the memorandum in the case on August 28, 1925. Mexico objected on the ground that Alexander St. J. Corrie did not present his claim within the period of time provided by the general claims convention of September 8, 1923, and as his claim is one for loss or damage accruing prior to that date, it cannot be accepted by the Commission.

Held: "Alexander St. J. Corrie's claim being identical with Jennie L. Corrie's claim not only in nature, amount and nationality, but even in this that both the new and the old claimant are the deceased sailor's parents, no recovery of a new damage is sought from Mexico, no new allegations are raised, no new basis is given the claim, no new defence is required. The proposed rectification is not in conflict with the Convention signed September 8, 1923, and is inconsequential for the respondent government. On these grounds the motion should be allowed."

GERTRUDE PARKER MASSEY *v.* MEXICO (Docket No. 352)

Opinion rendered April 15, 1927

Mexico held liable for a denial of justice growing out of the failure of the Mexican authorities to take proper measures to punish the slayer who, after capture and while awaiting trial, escaped while at liberty from jail with the permission of the jail-keeper and was not subsequently apprehended.

Neither the character nor the conduct of the victim can affect the rights of the United States to invoke the rule of international law which requires a government to apprehend and punish nationals who have committed wrongs against aliens.

There is no proper arrest and there can be no prosecution in the case of a man who is permitted by police authorities to leave prison. Wherever misconduct on the part of any persons in a nation's service, whether they be acts of commission or of omission, and whatever may be their particular status or rank under domestic law, results in the failure of the nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.

Counsel: United States, Marshall Morgan, Assistant Agent; Mexico, Oscar Rabasa.

NIELSEN, Commissioner:

1. Claim is made in this case by the United States of America against the United Mexican States on behalf of Gertrude Parker Massey, individually, and as guardian of William Patrick and John Kilbane Massey, minor children of herself and William B. Massey, an American citizen, who was killed by a Mexican citizen at Palo Blanco, Vera Cruz, Mexico. The claim is grounded on an assertion of denial of justice growing out of the failure of Mexican authorities to take adequate measures to punish the slayer of Massey.

2. On or about the fourth day of October, 1924, Massey, who was the terminal superintendent of the *Cía Metropolitana de Oleoductos, S. A.*, was killed in a building which is described in the record as a "bodega" (apparently some kind of a store) belonging to the petroleum company, by a Mexican citizen, named Joaquín R. Saenz, who was also employed by the company under the direction of Massey. It appears that the slayer fired six shots into Massey's body any one of which was probably sufficient to cause death. After the killing Saenz fled. He was captured and placed in jail at Tamiahua, Vera Cruz. Subsequently he was confined in prison at Tuxpan, Vera Cruz, from which he escaped on December 26, 1924, and he was not apprehended. The record contains copies of correspondence from which it appears that the American Consul at Tampico and the American Ambassador at Mexico City have from time to time urged that steps be taken to apprehend and punish the slayer.

3. It is stated in the Mexican answer that Massey attempted to commit the crime of rape on the wife of Saenz, and that this offense on the part of Massey prompted Saenz to take the life of Massey. The record contains a mass of grave accusations against the character of the deceased. I am not convinced of the truth of these charges against Massey which I consider are not supported by reliable evidence. Whatever may be the facts in relation to this point, I consider them to be entirely irrelevant with respect

to the pertinent legal issues in the case. In connection with the charge of immoral and illegal conduct made against Massey, the contention is made in the Mexican brief that "International law, justice and equity preclude a claim from being set up, on the general maxim *ex dolo malo non oritur actio*, when the alien from whose death the claim arises by his own immoral, negligent or unlawful conduct caused or contributed to cause his own death." I am not entirely clear with regard to the argument that was made that in a case of this kind law, justice and equity "preclude" a claim from being set up. Under Article I of the Convention of September 8, 1923, the United States has the right to present this claim to the Commission. The United States invoked the rule of international law which requires a government to take proper measures to apprehend and punish nationals who have committed wrongs against aliens. The legal issue presented to the Commission is whether or not the obligations of that rule were properly discharged with respect to the apprehension and punishment of the person who killed Massey. Neither the character nor the conduct of Massey can affect the rights of the United States to invoke that rule nor can they have any bearing on the obligations of Mexico to meet the requirements of the rule or on the question whether proper steps were taken to that end. In other words, the character and conduct of Massey have no relevancy to the merits of the instant claim under international law.

4. In the Mexican brief the contention is advanced that a state is not responsible for a denial of justice, when a private individual who is under indictment or prosecution for the killing of an alien is allowed to escape by a minor municipal officer in violation of law and of his own duty, if the state immediately disapproves of the act by arresting and punishing the officer, and reasonable measures are taken for the apprehension of the fugitive. It is asserted that an assistant jail-keeper unlawfully permitted Saenz to walk out of jail; that this minor official was arrested and strong action was taken against him; and that therefore no responsibility attaches to the Mexican Government for his misconduct.

5. No such defense with regard to the non-responsibility for the acts of the jail-keeper, and no facts regarding his conduct or steps taken to punish him for his wrongdoing are stated in the Mexican answer. It is therefore very questionable whether the defense could properly be advanced as it was in the Mexican brief and in oral argument in which contentions were forcefully pressed by counsel for Mexico with respect to the non-responsibility of Mexico for the acts of a minor official of this kind, and whether it is proper for the Commission to consider it. However that may be, I am of the opinion that the argument made with respect to this question of responsibility for the jail-keeper is not well taken.

6. An examination of the opinions of international tribunals dealing with the question of a nation's responsibility for minor officials reveals conflicting views and considerable uncertainty with regard to rules and principles to

which application has been given in cases in which the question has arisen. To attempt by some broad classification to make a distinction between some "minor" or "petty" officials and other kinds of officials must obviously at times involve practical difficulties. Irrespective of the propriety of attempting to make any such distinction at all, it would seem that in reaching conclusions in any given case with respect to responsibility for acts of public servants, the most important considerations of which account must be taken are the character of the acts alleged to have resulted in injury to persons or to property, or the nature of functions performed whenever a question is raised as to their proper discharge. As the Commission has heretofore pointed out, it appears to be a proper construction of provisions in Article I of the Convention of September 8, 1923, that uncertainty with respect to a point of responsibility was largely eliminated by the two governments when they stipulated that the Commission should pass upon "all claims for losses or damages originating from acts of officials or others acting for either government and resulting in injustice."

7. The question which has been raised in the instant case, and not infrequently in cases coming before international tribunals, is not one that can be properly determined in the light of generalities such as are frequently found in the opinions of tribunals. That this is true may be shown by a brief reference to citations of cases appearing in the Mexican brief.

8. With respect to the broad statement in an opinion rendered by Attorney General Cushing to Secretary of State Marcy under date of May 27, 1855 (7 Ops. Atty. Gen'l 229), it is pertinent to note the precise character of the Peruvian Government's claim with respect to which Mr. Cushing advised Mr. Marcy. A Peruvian vessel was stranded as a result of the unskillfulness or carelessness of a pilot in the Bay of San Francisco. While this pilot was under a measure of supervision of State authorities and was licensed by them, he was employed by the master of the Peruvian vessel, who was at liberty to pilot his own vessel or to employ an unlicensed pilot. Mr. Cushing was of the opinion that neither the State of California nor the United States was the "guarantor, security or assurer" of the professional acts of the pilot. It may be still more pertinent to note that the claim evidently directly grew out of a complaint against a marshal for alleged improper conduct in not recovering a judgment which had been obtained against an associated body of pilots to which the incompetent pilot belonged, and that Mr. Cushing stated that the Peruvian claimants had an adequate legal remedy in the courts. The importance which Mr. Cushing attached to the failure to exhaust local remedies (a subject with which we are not concerned in this arbitration in view of the stipulations of Article V of the Convention of September 8, 1923) is clear.

9. In the Bensley case, Moore, *International Arbitrations*, Vol. 3, p. 3016, the Commissioners stated that there was no allegation that the acts complained of were perpetrated by any person or officer "in the employment

or under the control of the Mexican Government, or for whose proceedings that government was or ought to be responsible," and that "the injury sustained by the memorialist, as set forth by him, was inflicted by a municipal officer (a village alcalde) of the village of Dolores, against whom redress might have been had before the judicial tribunals of the country."

10. In the Blumhardt case, *ibid.*, p. 3146, the failure of the claimant to resort to local legal remedies against a Mexican inferior judge is clearly emphasized. The Mexican Government could not be held responsible, said Umpire Thornton, for losses when the complainant had "taken no steps by judicial means to have punishment inflicted upon the offender and to obtain damages from him," and when it was "against him that proceedings should have been taken."

11. Sir Edward Thornton, Umpire in the arbitration under the Convention of July 4, 1868, between the United States and Mexico, often rejected claims because of the failure of claimants to exhaust legal remedies. See *ibid.*, pp. 3126–3160.

12. In the Slocum case, *ibid.*, p. 3140, Umpire Thornton stated that the Mexican Government could not be held responsible for the action of a Mexican prefect in ordering the imprisonment of the claimant, who had refused to pay taxes. The Umpire declared that the claimant was not justified in refusing to pay the taxes; that payment should have been made; and that an appeal could have been made to the proper authorities for a refund of improperly levied taxes.

13. In the Leichardt case, *ibid.*, p. 3133, damages were claimed because the claimant had been arrested and mistreated at the direction of a secretary to a governor of a Mexican State. No proceedings were instituted by the claimant against this minor employee who was guilty of such peculiar action in bringing about the mistreatment of the claimant. In dismissing the case, Umpire Thornton said:

> . . . it must be understood by foreigners in every country that wherever there is a fair prospect of obtaining justice by due course of law, for wrongs and injuries inflicted by private persons or by "paltry petty officers, drest in a little brief authority," like the governor's secretary, for instance, they must resort to the courts of the country, and in such cases only appeal to their own sovereign when the courts of the country refuse to do their duty, or misconceive it, or pervert justice *in re minime dubia.*

14. The Kellett case, *ibid.*, Vol. 2, p. 1862, grew out of difficulties which an American vice-consul general had in Siam with Siamese soldiers. A disposition of the affair which resulted in a disciplining of the soldiers, was effected by the American Minister to Siam and an assistant legal adviser to the Siamese Government. From the available record it does not appear that any claim for pecuniary indemnity was made by the United States in this case.

15. It is stated in the Mexican brief that in the Maal case, Ralston's Report, p. 914, the decision holding Venezuela responsible, was based on the fact that certain officers against whose acts complaint was made were never reprimanded or punished, and quotation is made of a statement to the effect that there had been no reprimand, punishment or dismissal of these officers. It is pertinent to note, however, that the first reason for responsibility given by Umpire Plumley is stated in a sentence immediately preceding the statement quoted. The sentence reads as follows:

> The umpire acquits the high authorities of the government from any other purpose or thought than the mere exclusion of one regarded dangerous to the welfare of the government, but the acts of their subordinates in the line of their authority, however odious their acts may be, the government must stand sponsor for.

16. The report in Moore's *Arbitrations* of the case of Pierce is very meagre. It is merely to the effect that the claimant was arbitrarily arrested by an officer of local police in Mexico; that the authorities proceeded against this official, fined, reprimanded and dismissed him from office; and that the claimant was not "under the circumstances, entitled to an award." In the light of the particular facts in this case it seems reasonable to suppose that little if any fault could be found with this decision.

17. In considering the question of a nation's responsibility for acts of persons in its service, whether they be acts of commission or of omission, I think it is pertinent to bear in mind a distinction between wrongful conduct resulting in a direct injury to an alien—to his person or his property—and conduct resulting in the failure of a government to live up to its obligations under international law. The cases which have been cited are concerned with the former; the instant case with the latter.

18. I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of any such persons, whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.

19. In an instruction addressed by Secretary of State Hay to the American Minister to Honduras under date of February 25, 1904, directing the presentation of a claim against the Honduran Government on account of the injuries inflicted on Charles W. Renton, an American citizen, and his family, is a passage that seems to be very apposite to the instant case. In that instruction Secretary Hay said:

> The liability of the Government of Honduras is believed to be fully established, however, on grounds apart from the fact that a minor official of that Government was directly concerned in the crime. While a state is not ordinarily responsible for injuries done by private individuals to other private individuals in its territory, it is the duty of the state to diligently prosecute and properly punish such offenders, and for its refusal to do so it may be held answerable in pecuniary

damages. There was an inexcusable delay in initiating a judicial investigation. The first proceedings were partial and one-sided. The subsequent judicial proceedings, which were the direct result of the naval investigation by the U. S. S. *Montgomery*, terminated in condemning for minor offenses persons who, the evidence before the Department shows, were guilty of a deliberate and brutal murder. And finally, soon after the decision of the supreme court all of the murderers, with the single exception of Dawe, were permitted to escape. (*Foreign Relations of the United States*, 1904, p. 363.)

20. The statement of facts in the above-quoted passage reveals clearly a failure on the part of Honduran authorities to employ adequate measures to punish wrongdoers. Compensation was made by Honduras in satisfaction of the claim.

21. Citation is made in the Mexican brief to the Neer case, Docket No. 136, decided by this Commission.[1] In that case it was contended in behalf of the United States that proper steps had not been taken to apprehend persons who had killed an American citizen. The Commission, while being of the opinion that more effective measures might have been employed, held that the record did not disclose evidence of such a gross degree of negligence as would warrant the Commission in finding that the Mexican Government was chargeable with a denial of justice.

22. Citation is also made in the Mexican brief to the case of Catalina Balderas de Díaz, Docket No. 293, decided by this commission on November 16, 1926. In that case the Commission refused to sustain the charge of a denial of justice made by the Mexican Government against the Government of the United States because of the failure of authorities to apprehend the murderers of a Mexican citizen. The Commission held that not only was there no evidence in the record of "gross negligence on the part of the American authorities," but no evidence whatever of negligence.

23. I am of the opinion that the record in the instant case clearly reveals gross negligence on the part of the Mexican authorities resulting in a denial of justice. This conclusion I ground on an examination of records throwing light on the actions of authorities which the United States has alleged were improper.

24. Saenz having been arrested, certain proceedings were carried on before a judge at Palo Blanco, a municipal court of Tamiahua, and the Court of First Instance at Tuxpan. The record before the Commission reveals that during the course of these proceedings statements were made by some persons who had some direct information regarding the killing of Massey. Other persons appeared and related stories that they had heard regarding incidents in the life of Massey entirely unrelated to the slaying of the deceased. For example, a Mexican officer, Lieutenant Gabriel Martínez testified that he had had an altercation with Massey because Massey had discharged a watchman, and that he (Lieutenant Martínez) had had com-

[1] Printed in this JOURNAL, July, 1927 (Vol. 21), p. 555.

plaints from several persons, whose names he did not remember, that Massey was attempting to make love to their wives. The Lieutenant also mentioned, as several persons appearing as witnesses did, that it was "rumored" that Massey had had intimate relations with a certain woman whose name frequently appears in the record. The record contains statements of several persons to the effect that Massey was a man of despotic character; that he treated employees under his direction harshly; that he had had disgraceful incidents with several women; that it was rumored that he had illicit relations with a certain Mexican woman; that he was disliked by the majority of the men under him. Turning from these proceedings, we find that they were suspended because of the escape of the accused from jail.

25. There is no proper arrest and there can be no prosecution in the case of a man who is permitted by police authorities to leave prison. It is argued in behalf of the Mexican Government that the Mexican Government is relieved from responsibility for the failure to bring Saenz to justice because it arrested and punished José Refugio Vargas, the minor official responsible for the escape of Saenz, and took reasonable measures to apprehend the latter after his escape. Whatever bearing, if any, the arrest of the assistant jail-keeper, Vargas, might be considered to have on the question of Mexico's responsibility in this case, it is not a point of any material importance. With respect to this matter it may be observed, in the first place, that the record does not show that Vargas was prosecuted and punished, although there is evidence that he was arrested and spent some time in jail, and, in the second place, that the conditions surrounding the imprisonment of Saenz reveal a situation of something more serious than an unexpected breach of trust on the part of a single minor official. Whether or not the keepers of jails may properly be designated as minor officials, they are assuredly entrusted with highly important duties. The point is more important than the amount or character of their official emoluments or the particular definition or designation of their position under the domestic law of their country. We find Vargas testifying during the course of the proceedings instituted against him that Saenz and three other persons charged with homicide, on one occasion requested Vargas for permission to leave the jail and that, after a conference with the commandant of the guard, the jail-keeper permitted the prisoner to depart. Vargas explained that he took such action because he had heretofore seen the warden of the jail do the same thing. The following extract from the testimony of Vargas, irrespective of the question of accuracy in detail, undoubtedly throws some light on conditions in the jail:

> It was about 8 o'clock on the night of the 26th of the current month when the warden of the jail left, whose name is Antonio R. Marquez, leaving the care of the jail to the speaker, and from between 10 and 11 of the same night while he was lying down the commandant of the

guard, Amador, whose other name he does not know, came to him and stated that at the window which opens on court No. 2 there were parties talking, and he arose and saw that it was Joaquin R. Saenz, who stated to him that they had permission to go out to the street, Joaquin R. Saenz, Teofilo Florencia, Isaac Ovando and Felix Gamundi, the latter returning about one in the morning; that when they asked the speaker for permission to go outside he consulted the commandant of the guard and on agreement with the latter the above mentioned parties left, that the declarant allowed this to be done because prior thereto he had seen the warden do the same thing, and that by verbal order given him by the same warden for allowing to go out the said Joaquin R. Saenz, Teofilo Florencia and Gamundi, and that on the same day the warden had allowed Corporal Francisco Valenzuela to enter in order to converse with Saenz and Gamundi, the corporal inviting them to take beer, which Saenz and Gamundi accepted and took in the presence of the said warden; that upon the termination of the conversation the speaker shut Saenz and Gamundi up in the presence of the warden.

26. The record shows that Saenz, before the time when he took his final departure from jail by permission, had been allowed to leave the jail on at least one other occasion.

27. With regard to the argument made with respect to the bearing on the question of Mexico's responsibility of the steps taken to apprehend Saenz, it may be concluded that there is no evidence in the record showing that any effective action has been taken by the appropriate authorities to apprehend the accused. On this point counsel for Mexico called attention to a letter written by the Mexican Secretary of the Interior to the Governor of the State of Vera Cruz, requesting that all necessary measures be taken to apprehend Saenz and other fugitives. Citation was also made to a communication written by the Governor of the State of Vera Cruz to the American Consul at Tampico from which it appears that certain prosecuting authorities had requested a Mexican judge having knowledge of the case to issue the necessary orders and circular asking for the apprehension of Saenz. But there is no specific evidence that police authorities took any steps to apprehend him and no evidence of any difficulties experienced by such authorities to locate this well-known fugitive. In connection with the citation in the Mexican brief of the claim of Catalina Balderas de Díaz, it is pertinent to note that in that case the record contained evidence that there was no clue whatever to the identity of the guilty person; that military authorities and civilian police authorities had made diligent efforts to locate the guilty person; and that many persons had been arrested on suspicion.

28. In the light of the reasons which I have stated, I consider that the contentions of the United States that there was a denial of justice in this case growing out of the failure of Mexican authorities to take proper measures to punish the slayer of Massey have been established. I am of the opinion that an award of $15,000.00 (fifteen thousand dollars) may properly be made on behalf of the claimant.

VAN VOLLENHOVEN, Presiding Commissioner:

I concur in paragraphs 1 to 6, inclusive, 18, 23, and 25 to 28, inclusive, of Commissioner Nielsen's opinion.

[Concurring opinion of MacGregor, Commissioner, differing from Commissioner Nielsen's estimate of some of the cases cited by the Mexican Agency and defending the Mexican judicial procedure criticised in paragraphs 23 and 24 of Commissioner Nielsen's opinion, omitted from this JOURNAL.]

Decision

For the reasons stated above the Commission decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of Gertrude Parker Massey the sum of $15,000 (fifteen thousand dollars) without interest.

Done at Washington, D. C., this 15th day of April, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

GEORGE W. JOHNSON, ARTHUR P. WHITE, Executor, and MARTHA J. MCFADDEN, Administratrix, *v.* MEXICO ("Daylight Case," Docket No. 353).

Opinion rendered April 15, 1927

Claim for damages by part owners of an American sailing vessel which, while at anchor outside Tampico, Mexico, was wrecked and lost in a collision with a Mexican gunboat which was changing its position during a severe storm.

The collision occurred in Mexican waters and Mexican law is applicable. The law in force in Mexico at the time of the collision contained no presumption in favor of ships at anchor or in favor of sailing ships in collision with steamers.

If Mexican law in this matter were in open conflict with universally recognized international law, the Commission should take such conflict into account; but while there is quite a reasonable element in these presumptions for collisions under normal weather conditions, under abnormal storm conditions any generalization would seem objectionable.

There being no sufficient evidence before the Commission enabling it to hold that either captain was guilty of culpable negligence or unskillful navigation, and there being no presumption, or specific rule for the burden of proof, in the Mexican law as it stood in 1882, culpable fault on the part of the gunboat cannot be assumed, and the claim is disallowed.

Counsel: United States, J. Whitla Stinson; Mexico, Enrique Munguía, Jr.

VAN VOLLENHOVEN, Presiding Commissioner:

1. This claim is asserted by the United States of America on behalf of the part owners (or their successors in interest) in the American schooner *Daylight*, which on the night of March 21, 1882, while at anchor outside the bar at Tampico, Tamaulipas, Mexico, was in collision with a Mexican gunboat under way, the *Independencia*. The schooner, with its cargo and the personal effects of its crew, was wrecked and lost. The United States alleges that the collision was due to culpable negligence or faulty seamanship on the

part of the *Independencia* and that the Government of Mexico is responsible for damages caused by its public vessels; and therefore claims damages in the amount of $5,948.62, with interest.

2. The main facts of the case are as follows. In the late afternoon of March 21, 1882, there were at anchor within Mexican territorial waters just outside the Tampico bar an American sailing vessel, the schooner *Daylight*, and about a mile to the north of this schooner the Mexican gunboat *Independencia*. The captain of the *Daylight* had gone ashore about 3 p. m. to make entry of his ship, and had not returned. The weather had been fair and had continued so until about 7:30 p. m. when suddenly a strong wind from the north, shifting to the northwest, commenced to blow, which about 8 p. m. developed into a violent storm with lightning, rain, darkness and a very rough sea. The commander of the *Independencia*, which was anchored with her starboard anchor secured by two chains, deemed it advisable for the safety of his vessel to put out to sea or, at any rate, to seek a better location. Therefore the *Independencia*, with her lights burning, began to weigh her anchor and to go ahead slowly in the southern direction; but, from about 7:50 p. m. on, made her engines work full speed, while dragging her starboard anchor. The *Daylight*, also with burning light, and two other ships which were anchored not far off could see the steamer approach from at least that time on; as soon as the *Daylight* noticed her, or perhaps before that time, she either filed all available chain, or made everything ready to do so. The first shock of the collision occurred some twenty-five minutes later, about 8:15 p. m.; all this time, or at least the latter part of it, the gunboat had been seen tacking, and one sailor from the crew of the *Daylight* (the Swedish seaman Peter Johnson) testified before the port authorities on March 25, 1882, that the gunboat at the time of the collision was "doubtless driven by the wind." It is worthy of remark that, according to the evidence, it took the *Independencia* more than half an hour to reach the *Daylight* which was anchored only one mile to the south. When the steamer had reached a distance of about ten fathoms from the *Daylight*, the officer on guard called out in English to the crew of the *Daylight*, expecting that the gunboat working under full steam might pass by the schooner without colliding if the schooner filed away more chain. The mate of the *Daylight* who replaced his captain testified on March 25, 1882 that he "supposed that the steamer was working to drive ahead." Instead, however, of advancing the *Independencia* drifted down backward and fell sternwise upon the schooner. Succeeding this first shock the commander of the gunboat ordered its engines reversed to disengage his ship, but driving back under full steam the entire length of the schooner it struck her again several times so as to tear out her bowsprit, to have her foremast entangled in the yards of the gunboat, and to split her foredeck. The clash threw back the steamer's smokestack. Some ten minutes after the first shock occurred the vessels were disengaged; the *Independencia* proceeded, was soon stopped, and dropped both her anchors

some one hundred yards astern of the ill-fated *Daylight*, which had been filling rapidly with water and gradually sank. Neither in the latter part of the night nor on the next morning did the *Independencia* take pains to rescue the crew of the *Daylight*; they were not saved until about 7:30 a. m. on March 22, 1882, by a British schooner, the *Busiris*.

3. The great difficulty in this case, as in numerous collision cases, is one of conflicting and insufficient evidence. The only investigation of the facts that has been made was the one by the Mexican port authorities at Tampico who examined the masters and crews of both vessels (the Americans first) within the three weeks following the tragedy. The commander of the *Independencia* stated twice—once in his report of March 23, 1882, and once in the investigation on April 5, 1882—that the danger of the sudden rain storm moved him to seek a safer location. He stated that he did so carefully, at first maintaining his starboard anchor and going slowly, but that after that he had to proceed under full steam; however, though the engines before and at the time of the collision were working at full speed, the vessel, since it was dragging one of its anchors, was not proceeding full speed. Mexico moreover contends that, if the American vessel had paid out more chain as soon as it was warned, the collision might have been prevented. The United States, on the contrary, contends that the gunboat knew that there was a schooner anchored only a mile off to the south; that under those conditions and with a strong "norther" blowing the gunboat should not by leaving its perfectly safe position have disregarded the safety of other vessels; that when the steamer's smokestack fell there was a confusion or worse among the crew on board the *Independencia*. Besides, the United States asserts—apparently basing its assertion on statements made by the mate and the sailor Oakland on March 25, 1882—that the *Daylight*, after the storm began and before the accident, had paid out all available chain, some thirty fathoms more than she had so far filed; but in the protest before the American consul on March 27, 1882, the captain and crew of the *Daylight* established that the crew "made everything ready to slip said Schooner's chain," but "had no occasion to slip Schooner's chain." The lack of conclusiveness in the evidence as presented on both sides before this Commission, which is the same evidence as was produced in the very next years following the occurrence (1883–1886), would seem to appear from the fact that the American Secretary of State on July 2, 1886, informed the American representative at Mexico City of the claimant's being invited "to produce whatever countervailing proof may be in his power," and that such further evidence never was obtained.

4. Among the Mexican evidence there is an inexplicable statement of the commander of the gunboat to the effect that, because of the extreme darkness, the light of the *Daylight* could not be seen until a short time before the collision; though there is evidence that the *Daylight* saw the gunboat from the beginning and that two other ships saw the lights of both vessels. Nor is it sufficiently explained why the *Independencia* after having been overwhelmed

by the storm for half an hour could easily come to anchor, with both starboard and port anchors out, instantly after the collision. Among the American contentions, on the other hand, there is the unbelievable assumption that the Mexican commander had left without any reasonable ground a safe and effective anchorage in a dark, stormy and dangerous night in waters with which he must have been quite familiar, and the dangers of which are well known to every Mexican seaman; in this connection it is worthy of note that one of the sailors of the *Daylight* (Abraham Oakland) testified on March 25, 1882, that after the storm began, but before the crew had noticed any movement of the gunboat, he had been "engaged in trimming the jib sails, so the schooner could put out to sea." The cook of the *Daylight* testified on March 25, 1882, that the mate (who replaced the captain, and who according to other evidence had been on deck when the tempest began) did not return on deck until the gunboat was within ten fathoms to the north of the schooner and the collision was imminent. The statement submitted by the United States that the *Independencia* if left to the current and wind could not possibly have collided with the *Daylight* would seem to indicate that the mere fact of the commander's leaving his original anchorage did not in itself constitute a dangerous act for this neighboring ship.

5. The evidence as to fault on either side being greatly at variance, such as to leave the cause of the collision unascertainable, it is essential to determine whether some special rule as to burden of proof, or some presumption, can be invoked.

6. In the *Queen* case between Brazil and Norway, which was a case of a collision (1870) in Paraguayan waters between an anchored Norwegian sailing vessel and an *aviso* of the Brazilian navy under way at full speed, the arbitrator used as a basic rule the general principle that the burden of proof is incumbent upon the claimant government (Norway), and rendered an award in favor of Brazil (Lapradelle et Politis, *Recueil*, II, 708). In paragraphs 6 and 7 of its decision rendered March 31, 1926, in the case of William A. Parker (Docket No. 127),[1] the Commission set out the grounds why this rule as to burden of proof is inapplicable to its proceedings. As to whether in case of collision between a ship at anchor and a ship under way the burden of proof by way of exception falls on the latter one, it may be stated that such a rule of evidence, where it exists, is usually considered and construed rather as a presumption of fault on the part of the ship under way, than as a rule concerning evidence.

7. The United States contends that such a presumption in favor of ships at anchor, and another presumption in favor of sailing ships when colliding with steamers, are recognized by universal maritime law, and should be applied by this Commission which is bound to decide in accordance with the principles of international law, justice and equity. Mexico, on the other hand, asserts that, as the collision occurred in Mexican waters, Mexican law

[1] Printed in this JOURNAL, January, 1927 (Vol. 21), p. 174.

is applicable, and that the Mexican law on collision in force in 1882—the *Ordenanzas de Bilbao* of 1737, confirmed in 1814—did not contain these presumptions. There would seem to be no doubt but that with reference to the present collision the law of Mexico is applicable. In the *Sidra* case [2] the British-American arbitral tribunal held that "according to the well settled rule of international law, the collision having occurred in the territorial waters of the United States, the law applicable to the liability is the law of the United States" (Nielsen's Report, 457; see the *Canadienne* case,[3] Nielsen's Report, 430). In 1888, at its session of Lausanne, the *Institut de droit international* considering the problem of collisions both from the viewpoint of existing law and from that of a future uniform law, resolved in its drafts covering both viewpoints (under the guidance of such experts as Messrs. Lyon-Caen and Renault from Paris) that the law applicable is the law of the land where the collision took place—a solution qualified by Mr. Renault as required even by "*ordre public*"—and the Institute identified collisions within territorial waters with collisions in the interior of a country. If Mexican law in this matter were in open conflict with a universally recognized provision of international law the Commission should take such conflict into account; but even those international awards and authors who contend that in collision cases the Anglo-Saxon presumption in favor of the ship at anchor "is a universally admitted rule of maritime law" or is "*reconnu par tous les pays maritimes*" (Neilsen's Report, 485; Lapradelle et Politis, II, 708) do not go so far as to establish that a disregard of this presumption constitutes a conflict with binding provisions of international maritime law. There certainly is a quite reasonable element in these presumptions for collisions under normal weather conditions; but under conditions so abnormal as this Tampico storm any generalization would seem objectionable. One of the first codes embodying the presumption in favor of ships at anchor, the maritime code promulgated by the Emperor Charles V for the Low Countries in 1551, contains an express reservation relative to "a great tempest" and similar causes (Article 48 of said Code). In 1888 at Lausanne the presumptions were not included in either draft of the *Institut de droit international;* in 1898 at the Maritime Law Conference in Antwerp the question of the desirability of a specific provision for collision between a ship at anchor and a ship under way was unanimously answered in the negative by all of the affiliated national associations; and in the Brussels Convention of 1910 on collision law (Article 2, paragraph 2; and 6, paragraph 2), all presumptions, and especially that regarding ships at anchor, were abandoned.

8. It is to be considered, then, what the Mexican law in force in 1882 provided with reference to a collision of the present type. The existing federal Code of Commerce which contains a division (book the third) embodying maritime law was not in force at the time; it was not enacted until September 15, 1889. In 1822, the year of the occurrences discussed here, the Mexican

[2] Printed in this JOURNAL, Vol. 16 (1922), p. 110. [3] Printed, *ibid.*, Vol. 8 (1914), p. 655.

Constitution of 1857 was already effective and it provided that all controversies relating to maritime law should be under the cognizance of the federal courts (Article 97, paragraph II). Said courts, in those days, applied as positive law the *Ordenanzas de Bilbao*, which had been the first mercantile law of the Mexican Republic in the period which elapsed between the date of the country's independence and May 16, 1854, the date of the promulgation of the first Mexican Code of Commerce, styled the *Lares Code*, after the minister who sponsored its passage. The *Lares Code*, was set aside by Article I of President Alvárez' decree of November 23, 1855, providing that the administration of justice should conform itself to the laws in force on December 31, 1852, and that the state courts with general jurisdiction should take cognizance of commercial law-suits conformably to the ordinances and laws peculiar to each branch. At that time, in 1852, the law in force was the decree of November 15, 1841, which in Article 70 provided that, pending the enactment of a federal Code of Commerce, the law-suits of this branch should be decided in accordance with the *Ordenanzas de Bilbao*, in so far as these ordinances had not been set aside. Therefore these ordinances had to be applied by the federal courts of Mexico, to which the Constitution of 1857, as stated heretofore, had transferred the jurisdiction in cases of maritime law. In the Bilboa ordinances the subject of collision is found under Chapter XX (*De las averías ordinarias, gruesas, y simples; y sus deferencias;* 36 articles), in Article 34 of which the general rule of responsibility for fault is reproduced, without the introduction of any presumption. It cannot be maintained that this silence on legal presumptions renders the Mexican law of the time incomplete and requires that it be supplemented by provisions drawn from the maritime law of a group of other countries.

9. In collision cases the first question to be answered is not which vessel is at fault, but whether either of the colliding vessels is at fault. Fault should be proven; absence of culpable fault must be surmised in cases where the cause of the collision cannot be ascertained. There being no sufficient evidence before the Commission enabling it to hold that either commander or captain was guilty of culpable negligence or unskillful navigation, and there being no presumption, or specific rule for the burden of proof, in the Mexican law as it stood in 1882, culpable fault on the part of the *Independencia* cannot be assumed.

10. There appears, however, in the record a circumstance which might raise serious doubts as to the respect felt for human lives on the part of the *Independencia*. The commander of the gunboat knew that his ship had seriously damaged another vessel, and he might have suspected the danger arising out of the collision to the crew of the *Daylight*. Nevertheless there is no evidence as to any effort made by him either in the latter part of the night or even the next morning to render aid to the crew or the ship itself. It was left for a British schooner to save them, a long time after sunrise. Though this situation leaves a most unfavorable impression, the United

States did not press it, and no opportunity was given the *Independencia* to explain her aloofness. Even if no good motive for this inhuman behavior could be given, it would not furnish a legal ground for assuming culpable negligence with respect to the collision. At the Brussels Maritime Conference of 1905 it was expressly stated that, in cases of collision, failure on the part of one vessel to render assistance to the other vessel in distress does not in itself create a legal presumption of culpability for the collision (*Procès-verbaux du 17 octobre 1905*, pp. 7–10; Brussels Convention on collision law, 1910, Article 8, paragraph 3).

11. Mexico contends that there was laches on the part of the United States either in making the claimant present his claim in due form according to Mexican law, or in supplying further evidence. The first contention would seem untenable because of the fact that the reasons why the United States Government, rightly or wrongly, did not wish redress to be sought before Mexican administrative and judicial authorities were fully explained in the diplomatic correspondence of the years 1883–1886. Neither can laches be maintained with regard to the supplying of evidence, as the United States submitted all the evidence it could obtain. Once the diplomatic correspondence having come to a deadlock (1886), the United States, if unwilling to resort to force, could only wait.

12. For the reasons stated, the claim should be disallowed.

[Concurring opinions of Nielsen and MacGregor, Commissioners, omitted from this JOURNAL.]

Decision

The Commission decides that the claim of George W. Johnson, Arthur P. White, Executor, and Martha J. McFadden, Administratrix, must be disallowed.

Done at Washington, D. C., this 15th day of April, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.

FRED K. NIELSEN,
Commissioner.

G. FERNÁNDEZ MACGREGOR,
Commissioner.

IDA ROBINSON SMITH PUTNAM *v.* MEXICO (Docket No. 354)

Opinion rendered April 15, 1927

Reduction of the death penalty imposed by a lower court to eight years imprisonment at hard labor by a higher court because of doubtful circumstances concerning the perpetration of the homicide not sufficient to establish a denial of justice for which the Mexican Government is responsible.

The escape of the murderer after serving only thirty months of his sentence and the failure of Mexico to apprehend him make Mexico responsible for the denial of justice resulting from such conduct.

Counsel: United States, John J. McDonald; Mexico, Francisco A. Ursúa.

FERNÁNDEZ MACGREGOR, Commissioner:

1. This claim is presented by the United States of America against the United Mexican States demanding from the latter, in behalf of Ida Robinson Smith Putnam, an American citizen, the payment of $53,106.50 on account of the murder perpetrated by a Mexican policeman, Eleno Uriarte, on the person of the claimant's son, George B. Putnam, an American citizen, a mining engineer, on or about July 5, 1909, in Pilares de Nacozari, Moctezuma, Sonora, Mexico. It is alleged that Mexico is responsible for a denial of justice which consisted in that an entirely unjustified penalty was imposed on Uriarte and, furthermore, in that the latter was not even made to serve such sentence. The Mexican Agency presented a motion to dismiss this claim, but withdrew it on February 11, 1926.

2. The American citizenship of the claimant was challenged by the Mexican Agency in its answer, but this defense was not again used thereafter. I am of the opinion that the documents presented by the United States prove that this claim is impressed with American nationality.

3. The evidence contained in the record of this case is very meagre and it leaves in the dark what I consider to be the most important fact, and that is the escape of the convict, Uriarte. Nevertheless, the occurrences may be established as follows: On the date of the events, George B. Putnam attended a moving picture entertainment. At the close of the performance, Putnam went out in the street alone. It was then dark and it was raining. A few minutes after his leaving, several persons heard two shots and then a scream or moan, for which reason one of said persons went to the Chief of Police and informed him that a man had just been killed. Said Chief of Police, together with another policeman and the informant, went to the place where the shots had been heard and found the lifeless body of Putnam; there was found near it a yellow raincoat. A woman testified that after the shots, looking out through a window of her house, she saw, at a distance of about three meters, a man running with a pistol in his hand, who appeared to her as policeman Eleno Uriarte. It appears that the Chief of Police later reviewed the men under his command, all of them having answered the roll call except the aforementioned Uriarte. One of the policemen declared that he recognized as his own the yellow raincoat found near Putnam's

corpse and that it was the same one which the deponent had loaned to Uriarte on the previous night. In view of the foregoing circumstances, prosecution was started, a warrant was issued for Uriarte's arrest, and upon his having been arrested three weeks later, on July 29, 1909, he was examined by the Judge of First Instance of the District of Moctezuma, before whom the prisoner confessed his guilt, declaring that he had killed Putnam through jealousy. That when Putnam left the motion picture theatre, at about ten o'clock at night, said Uriarte told him that he wanted to have a talk regarding the affair which was still open between them. That they walked together some distance; that Putnam became incensed and attempted to throw himself on the deponent; that they both wrestled and fell; that they stood up at once, and that, then, Uriarte withdrew and, thinking that Putnam was carrying an arm, fired his gun on him twice and afterwards fled. The Commission does not have before it the complete criminal proceedings that were thereupon instituted against Uriarte, but in the record of this claim appear the decisions rendered in the first instance by the Judge of First Instance of the District of Moctezuma, on October 18, 1909, and on appeal by the highest court of justice of the State of Sonora, on June 22, 1910. The lower court did not consider as proven the plea of self-defense made by Uriarte and found him guilty of homicide perpetrated without provocation and with treachery, for which it sentenced him to death. The higher court modified the decree of the court below, as it considered that the homicide had been committed during an encounter and that the treachery had not been proven, and on this ground it reduced the death sentence to eight years imprisonment and hard labor.

4. The memorial of the claim mentions only the trial in the first instance, and alleges that instead of shooting Uriarte at once, his execution was postponed until the first day of April, 1911, when he was liberated from prison to defend the town of Moctezuma for the Federal forces against the Revolutionists. It is further alleged that Uriarte at once joined the latter and that he was not again apprehended by the Mexican authorities, thus escaping punishment for his crime. The evidence submitted by Mexico in the answer shows, as has already been stated, that Uriarte was still in prison in April, 1911, because the court of appeal had commuted the death penalty to eight years imprisonment. A document presented by the Mexican Agency during the hearing of the case, shows that Uriarte, who had been taken out of the jail of Moctezuma, escaped on May 4, 1911, and that, upon having been re-arrested in Dolores, Chihuahua, he was sent to Sahuaripa, Sonora, and from the latter place to the penitentiary of Hermosillo, Sonora, having remained in this prison from June 3, 1912, until March 29, 1913, when he was liberated therefrom by Colonel Joaquin B. Sosa, then military commander of the said city of Hermosillo, and his whereabouts since that date is unknown. In view of the vagueness of the evidence with respect to the facts in connection with the escape of Uriarte, the Commission asked both agencies

to present additional evidence thereon, but the Mexican Agency was not able to add anything and the American Agency only presented two letters, which reveal the lack of success in its efforts to find new facts, and a memorandum regarding the military authorities who occupied Hermosillo, Sonora, in 1913, which makes reference, at the end, to a Colonel Ramon B. Sosa who was commanding the forces of Batamotal, to the north of Guaymas, in May, 1913.

5. The above-mentioned facts, although meagre, as heretofore noted, establish, nevertheless, the lack of responsibility of Mexico in the present case, as regards the charge imputed to her by the United States, of having violated its international duty by imposing on the slayer of Putnam a penalty out of proportion to his crime. The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country. (Case of Margaret Roper, Docket No. 183, paragraph 8).[1] A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law. We have now before us an appellate decision, rendered by the highest court of the State of Sonora. Nothing appears to show that the proceedings which that decision ended, may have been dilatory or inadequate. The charges presented against it are based, not on facts, but on conjectures, such as inferring premeditation from Uriarte's confession that he was jealous of Putnam, and imagining that there was no self-defense due to the fact that the criminal fled after his crime. It is also charged that the Supreme Court of Sonora reduced the sentence without receiving new evidence. The courts of appeal in Mexico usually do not receive new evidence, but they study the case to see if the facts have been weighed correctly by the lower court and to see, especially, if the latter has applied to the case the corresponding legal precepts. This is what the highest court of justice of Sonora did and had the right to do. Neither is the commutation itself of the death penalty to eight years imprisonment sufficient to establish a denial of justice. The penalty is notoriously unjust only when there is imposed for a crime, a penalty which does not correspond to the classification of said crime or when an unusual penalty is imposed for it. But to impose, for example, on a voluntary homicide one of the various penalties that are imposed for its different grades, aside from the death penalty, where there are doubtful circumstances concerning its perpetration, can never mean *prima facie* a wide deviation from justice, and in no manner, on the other hand, does it involve pardon or amnesty as the American brief seems to indicate. The sentence of the highest court of justice of Sonora is subject to no further examination, and the Mexican Government is not responsible on account of it.

[1] *Supra*, p. 777.

6. The claimant government alleges that the Mexican Government entirely failed in its obligation to punish the murderer of Putnam, as Uriarte escaped from the jail where he was imprisoned, and that he was never again apprehended. The evidence presented shows two escapes—one about 1911, after Uriarte, as alleged, had been taken out of the jail of Moctezuma to defend the town against the rebels, but he was then re-apprehended; and the other about 1913, after the prisoner was taken out of the jail of Hermosillo by a Colonel Joaquin B. Sosa, no information appearing about this re-apprehension. The first escape surely does not give ground for imputing responsibility to Mexico, since she apparently did everything possible to find the prisoner and to inflict on him the remaining punishment imposed. Nothing further is known concerning the second escape except the facts given above; it is not known who Colonel Joaquin B. Sosa was, to what forces he belonged (although it can be supposed that he belonged to the forces of the Constitutionalist Army, which at that time controlled the northern part of the Mexican Republic). (See George W. Hopkins case, Docket No. 39, paragraphs 11 and 12.)[2] In the light of these vague facts, it is impossible to fix precisely the degree of international delinquency of the respondent government; but there remain at least the facts that Uriarte escaped and that Mexico had the obligation to answer for Uriarte until the termination of his sentence, and she is now unable to explain his disappearance. In such circumstances it cannot be said that Mexico entirely fulfilled her international obligation to punish the murderer of Putnam, as Uriarte remained imprisoned only thirty months, more or less, and, therefore, Mexico is responsible for the denial of justice resulting from such conduct.

7. On the above grounds, due to the circumstances of the case, and in view of the standards set forth in paragraph 25 of the opinion rendered in the Janes case, Docket No. 168,[3] I believe the claimant can properly be awarded the sum of $6,000.00 (six thousand dollars), without interest.

VAN VOLLENHOVEN, Presiding Commissioner:

I concur in Commissioner Fernández MacGregor's opinion.

NIELSEN, Commissioner:

I agree with the conclusions reached by Commissioner MacGregor with respect to the liability of the respondent government. The claim preferred by the United States is grounded on an assertion of a denial of justice. The charge of a denial of justice is predicated first, on the action of the appellate court in setting aside the death penalty imposed on Eleno Uriarte and substituting a term of eight years imprisonment, and second, on the failure of Mexican authorities to carry out the sentence imposed by the appellate court.

Appellate courts in some countries do not have the power to reduce the sentence of an accused person, but I do not understand that the United States finds fault with the Mexican law under which this power is vested in

[2] Printed in this JOURNAL, Jan., 1927 (Vol. 21), p. 160.

[3] Printed in this JOURNAL, April, 1927 (Vol. 21), p. 362.

Mexican higher courts. Without entering into any discussion of the considerations which may have prompted the appellate court to reduce the sentence of the accused, I am of the opinion that no showing has been made which would warrant the Commission in reaching the conclusion that the reduction of the sentence resulted in a denial of justice as that term is understood in international law.

The other point in the case, the fact that the accused did not serve the entire sentence of eight years imposed upon him raises more difficult questions. These difficulties confronting the Commission result from the scarcity and vagueness of the evidence in the record. There is evidence of fault, but nothing more. Therefore it is, as stated in the opinion of Commissioner MacGregor, impossible to fix precisely the degree of delinquency on the part of the respondent government. The instant case therefore differs materially from other cases passed upon by the Commission in which there has been considerable evidence of negligence and in which the Commission has rendered larger awards.

Decision

The Commission decides that the United Mexican States are obligated to pay to the United States of America on behalf of Ida Robinson Smith Putnam $6,000 (six thousand dollars), without interest.

Done at Washington, D. C., this 15th day of April, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.

FRED K. NIELSEN,
Commissioner.

G. FERNÁNDEZ MACGREGOR,
Commissioner.

AMERICAN SHORT HORN BREEDERS' ASSOCIATION *v.* MEXICO (Docket Nos. 2397 and 3217)

WAUKESHA COUNTY HOLSTEIN-FRIESIAN BREEDERS' ASSOCIATION *v.* MEXICO (Docket No. 2403)

Opinions rendered April 27, 1927

These three claims were made against Mexico for the value of cattle shipped to exhibitions in Mexico, or for losses sustained in the purchase of such cattle for shipment. The claims were predicated upon guarantees given by the Industrial Agent of the Mexican National Railroad, who induced the claimants to participate in the cattle exhibitions, and who, it was claimed, was a Mexican official. The Commission found that the Industrial Agent did not claim to represent the Mexican Government and that he had no authority to give guarantees in behalf of Mexico. The claims were accordingly disallowed.

FRANCISCO MALLÉN *v.* UNITED STATES (Docket No. 2935)

Opinion rendered April 27, 1927

United States held liable in damages for an assault upon and arrest of the Mexican consul at El Paso, Texas, by a deputy constable of Texas, of Mexican origin, who, in satisfying a personal revenge, misused his official position.

In a claim of this type and in the statements corroborating it, the utmost accuracy is required, and there is no place for exaggerated, incomplete or conflicting contentions; however, exaggeration and even misrepresentation of facts on the part of claimants are not so uncommon as to destroy the value of their contentions.

Consuls of foreign nations are entitled to special protection in respect to their security and safety; and in countries where the treatment accorded citizens by their own authorities is somewhat lax, a special protection should be extended to foreigners on the ground that their governments will not be satisfied with the excuse that they have been treated as nationals would have been.

Punishment without execution of the penalty constitutes a basis for assuming a denial of justice. The reappointment of the officer as a deputy sheriff, after the cancellation of his appointment as deputy constable because of the assault, meant lack of protection in so serious a form that it amounts to a challenge; it was exactly the reverse of that protection due to all peaceful residents, whether aliens or nationals. Instead of providing the Mexican consul with that security for his person which was indispensable to permit him to perform his duties, it would have exposed him to daily danger if he had stayed at El Paso.

In awarding compensation for the physical injuries inflicted upon the consul, only those damages can be considered which are the direct results of the occurrence. While recognizing that an amount should be added as satisfaction for indignity suffered, account should be taken of the fact that very high sums claimed or paid in order to uphold the consular dignity related either to circumstances in which the nation's honor was involved, or to consuls in backward countries where their position approaches that of the diplomat.

Counsel: United States, C. L. Bouvé, Agent; Mexico, Eduardo Suárez.

VAN VOLLENHOVEN, Presiding Commissioner:

1. This claim is put forward by the United Mexican States on behalf of Francisco Mallén, a Mexican national. The claim is based on two assaults made on Mallén at El Paso, Texas, U. S. A., where he had been consul of Mexico since 1895, by one Juan Franco, an American deputy constable of Mexican origin; the first assault occurring on August 25, 1907, the second on October 13, 1907. Mexico alleges that the United States is responsible for illegal acts of an American official including an unwarranted arrest, for lack of protection, and for denial of justice in both trials relating to the assaults, and claims on behalf of the claimant damages for compensation and satisfaction in the amount of $200,000 with interest.

2. According to the respondent government, the present claim shows a peculiar and delicate feature in that the claimant has intentionally misinformed on several occasions his own government, the American Government and this Commission; especially in that he has submitted as evidence a garbled transcript of the proceedings in the second trial (November 7–9, 1907), allowing the text of the cross-examinations and other parts of the transcript to be destroyed though he knew the County Court at El Paso was not a court of record; in that he related the facts of the first assault in an exaggerated manner to his government; in that he made conflicting statements about the second assault; and in that he misrepresented the purport of Dr. Bush's visits to him after October 13, 1907. The question has been raised as to whether a claimant behaving as is alleged deserves to see his

claim espoused by his government or, once it has been so, to see it maintained by said government; or even, whether such a circumstance might induce the Commission to reject it.

3. The fact that Mallén's telegram of August 25, 1907, directed to the Mexican Foreign Office on the very evening of the first assault, was clothed in exaggerated words and that part of its contents is not supported by the evidence to which Mallén himself referred, can not be denied. Nor can it be denied that Mallén by submitting only a part of the transcript which he ordered made of the proceedings before the El Paso court on November 7–9, 1907, has removed from this Commission the best and most complete evidence it might have had regarding the second assault. Mallén, being at the time a man of fifty-three years, who had been a consul for twelve years, who was familiar with handling private affairs and who must have been somewhat familiar with criminal court practice in the United States, should not have acted in so uncautious a manner; he should have explained or at least established the several discrepancies between some of his earlier and later sworn and unsworn statements. But the mere fact that those parts of the transcript, which have been submitted to the Mexican Agency and by it have been rendered available for the respondent Agency and the Commission, contain references to the omitted cross examinations, would seem to indicate that Mallén could not have intended to destroy all traces of that part of the proceedings. As to the visits of the physician Bush, between Mallén's statements on the one hand and Bush's statement in court on November 7, 1907, on the other hand, there is contradiction in words, not in essence; a divergence does not occur until Bush's affidavits of December 22, 1910, and January 26, 1927. The conclusion from all of this should be to the effect that Mallén, strange though it may seem, has not sufficiently realized that in a claim of this type and in the statements corroborating it the utmost accuracy is required and that there is no place for exaggerated, incomplete or conflicting contentions. In paragraphs 8 and 9 of its opinion in the Faulkner case (Docket No. 47),[1] rendered November 2, 1926, the Commission, however, indicated that exaggeration and even misrepresentation of facts on the part of claimants are not so uncommon as to destroy the value of their contentions.

4. The evidence as to the first assault on Consul Mallén by Deputy Constable Franco, though unsatisfactory as to its details, clearly indicates a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official. On Sunday night August 25, 1907, in a street of El Paso, the deputy constable saw Consul Mallén, for whom evidently he had a profound aversion; pronounced to bystanders in uncouth language his intention to "get" and to "kill" that fellow; walked up to Mallén some five minutes later, and either slapped him in the face or knocked his hat off, possibly after having said some words in Spanish. Another

[1] Printed in this JOURNAL, April, 1927 (Vol. 21), p. 349.

policeman, or a private citizen Powers, was either called by telephone or happened to notice the event, and took Franco away. From Ciudad Juárez Mallén wired to Mexico City that he had been the victim of an attempt to shoot him with a pistol; but the evidence does not support that contention. Franco was prosecuted before the County Court at El Paso, and fined the next day $5 on account of disturbing the peace; the fine apparently has been paid. Mallén had intentionally abstained from submitting any complaint and from being present at the arraignment.

5. Direct responsibility of the United States for this first assault has not been alleged. Denial of justice is alleged, on the ground that the court treated an attempt to kill Mallén as a mere disturbance of the peace. Since the occurrence was submitted to the police court without any testimony on the part of Mallén himself, it is difficult to see how the court could have deemed it a dangerous attack of importance. Mallén at this time had no reason to suspect Franco of lying in wait for him in order to revenge the fact (of which Mallén was innocent) of the non-extradition by Mexico of a man who had been suspected of being the murderer of Franco's brother-in-law. Lack of protection *during* this occurrence can not be maintained; the second policeman, or the private citizen, did all that was necessary, and the incident was closed. On the other hand, it would seem quite unsatisfactory that a deputy constable, after disturbing the peace he was appointed to protect, was—as far as the record shows—neither punished in any disciplinary way, nor warned that he would be discharged as soon as a thing of this type happened again. The circumstance that within two months Franco, using the very same uncouth words to show his aversion for Mallén, availed himself of another opportunity to "get" Mallén, this second time misusing his official capacity, shows how imprudently and improperly the authorities acted in maintaining such a man, without any preventive measure, in a position in which he might easily cause great harm to peaceful residents. Mallén not long after August 25, 1907, applied to the county attorney at El Paso in order to inquire whether he was authorized to carry a pistol. The authorities of Texas therefore should have realized the risks they incurred by maintaining Franco in office and by not protecting Mallén from violence at the hands of Franco, and they must bear the full responsibility for their action.

6. The question has been raised whether consuls are entitled to a "special protection" for their persons. The answer depends upon the meaning given these two words. If they should indicate that, apart from prerogatives extended to consuls either by treaty or by unwritten law, the government of their temporary residence is bound to grant them other prerogatives not enjoyed by common residents (be it citizens or aliens), the answer is in the negative. But if "special protection" means that in executing the laws of the country, especially those concerning police and penal law, the government should realize that foreign governments are sensitive regarding the

treatment accorded their representatives, and that therefore the government of the consul's residence should exercise greater vigilance in respect to their security and safety, the answer as evidently shall be in the affirmative. Many penal codes contain special provisions regarding special felonies committed as against foreign diplomats; nobody will contend that such provisions exhaust the care which the government of their residence is bound to observe regarding their security and welfare. In this sense one might even say that in countries where the treatment accorded citizens by their own authorities is somewhat lax, a "special protection" should be extended to foreigners on the ground that their Governments will not be satisfied with the excuse that they have been treated as nationals would have been (see paragraph 8 of the Commission's opinion in the Roberts case, Docket No. 185,[2] rendered November 2, 1926, and paragraphs 13 and 16 of its opinion in the Hopkins case, Docket No. 39,[3] rendered March 31, 1926). In this second sense President Fillmore of the United States, in his annual message of December 2, 1851, rightly said:

> Ministers and consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws. . . . Ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station. (VI Moore, *Digest*, 813.)

In this second sense it was rightly stated by the Committee of Jurists appointed by the League of Nations on the Corfu difficulties, in a report adopted on March 13, 1924: "The recognized public character of a foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf." (AMERICAN JOURNAL OF INTERNATIONAL LAW 18, 1924, p. 543.) In this second sense again it was rightly contended in 1925 by an American author that "if a consul is not a diplomatic agent, he is nevertheless entitled to a certain degree of protection because of his public character," similarly as commissioners employed for special international objects, such as the settlement of frontiers, supervision of the execution of a treaty, etc., "receive a special protection, even though it does not amount to diplomatic privilege." (Eagleton in AMERICAN JOURNAL OF INTERNATIONAL LAW 19, 1925, pp. 303, 308.)

7. The second assault, October 13, 1907, happened on a Sunday afternoon in a street car moving from Ciudad Juárez, Chihuahua, Mexico, across the river to the adjoining city of El Paso, Texas, U. S. A. Franco starting from a house at the Mexican side saw Mallén on the car, boarded the back platform, and told the conductor that as soon as they would be on the Texas side

[2] Printed in this JOURNAL, April, 1927 (Vol. 21), p. 357.
[3] Printed, *ibid.*, January, 1927 (Vol. 21), p. 160.

he would "get" this man. Once the car was in the United States, Franco walked up from behind Mallén who was seated in the front of the car, violently struck him with his fist on the right side of the head so that the left side was bumped against the door or the window (which rendered Mallén unconscious for a moment), went on striking him several more hard blows even while he was on the floor, drew his pistol, drove Mallén at the point of it to the rear of the car, made the car stop a little later, and then took Mallén, his face all covered with blood, to the El Paso county jail. It has been proven beyond doubt that during the following trial even the co-counsel for the prosecution had no knowledge of a blow on the right temple struck with Franco's revolver; he alleged only a heavy blow with the fist and a pointing at Mallén with the pistol; and a similar statement was made by Mallén himself the day following the occurrence to an El Paso paper. There is no evidence to support the allegation of a blow with a revolver, except Mallén's sworn statement dated October 13, 1907 (the night of the event), according to which Franco had struck him "with his fists and by means and instrument to the affiant unknown." It is essential to state that the whole act was of a most savage, brutal and humiliating character. It is also essential to note that both governments consider Franco's acts as the acts of an official on duty (though he came from the Mexican side), and that the evidence establishes his showing his badge to assert his official capacity. Franco could not have taken Mallén to jail if he had not been acting as a police officer. Though his act would seem to have been a private act of revenge which was disguised, once the first thirst of revenge had been satisfied, as an official act of arrest, the act as a whole can only be considered as the act of an official.

8. Franco contended that he arrested Mallén because of his illegally carrying a gun. This contention has no merit. Not only does the record sufficiently show that the law of Texas prohibiting the carrying of fire-arms was being executed so as to allow the officials of both governments who often had to pass the border to carry them by way of mutual concession; but the county attorney at El Paso, not long after August 25, 1907, had explicitly told Mallén that he might do so without fearing any consequences—a fact, established not only by Mallén's statement, but also by co-counsel Beall's letter of November 13, 1907, to the American Embassy at Mexico City—and the authorities after the second trial did not give any attention to Mallén's alleged contravention of the Texas law. If Franco, being aware of the Mexican consul's unlawfully carrying a pistol, had merely wished to prevent such action, he would, instead of submitting Mallén to the humiliation of an arrest in a street car, have applied to his superiors requesting them to inform Mallén he was not authorized to carry arms, particularly since the district attorney (Estes) had advised him to apply to the county attorney or even to the grand jury. The arrest made by Franco in this manner and at a time when Mallén's pistol was not displayed was a mere pretext for taking private

vengeance. Neither government denies that, even supposing Franco's intention to have been to execute the Texas law, he went incredibly much farther than might have been necessary to perform any official duty.

9. There can be no doubt as to liability on the part of American authorities for this second assault on Mallén by an American official. The American Agency, in the conclusion of its reply brief, states: "The Agent of the United States does not contend that this Government is without responsibility in this matter. An 'official or other' acting in a broad sense for the United States was by an American jury, in the language of the treaty, found to have perpetrated an 'injustice' upon Mr. Mallén. This circumstance is properly resented by Mexico." A memorandum emanating from the American State Department, dated February 26, 1913, and filed among the evidence, concludes by stating that, if Mallén's allegations are not refuted, "it would be incumbent either upon the State of Texas or on the National government to accord him reparation for his injuries." Franco was acting for the State of Texas as assistant of a *State* official, and whereas the State Department at Washington was active in respect to this claim it was the government of the State of Texas which was negligent and careless. However, as this Commission has had occasion to point out more than once, acts of authorities of Texas may, under the Convention of September 8, 1923, give rise to claims against the United States and claims may be predicated on such acts.

10. The second assault was tried before the County Court at El Paso on November 7–9, 1907, and Franco was fined $100 for aggravated assault and battery resulting in wounds which were not serious. The injuries sustained by Mallén were demonstrated before the court as not being at the time of a serious nature, though they might have been dangerous, and the court in its instruction to the jury included a statement that "the evidence of bodily injury, inflicted upon Francisco Mallén by the defendant Juan Franco, does now show the injury to be of that serious character to warrant a conviction of aggravated assault" on *that* ground. Under these circumstances a fine of $100, being within the limits of the penal law, can not be said to represent a denial of justice merely because of its moderate amount.

11. Has that second fine plus the cost of the prosecution ($51.75) been paid? Mexico denies it, and there is no evidence to the contrary, except Franco's own affidavit of December 22, 1910, that he paid $95, which would mean a part only of the fine and costs. The county auditor at El Paso established on January 8, 1926, that Franco had given a bond for the sum of $151.75, but that "no record appears of any payments ever having been made on said Convict Bond." It therefore should be assumed that the second fine has not been paid. The sentence moreover read that, if the sum was not fully paid, Franco should be committed to the county jail. It was for the United States to show that he has been committed to jail. Punishment without execution of the penalty constitutes a basis for assuming a denial of justice.

12. Lack of protection on the part of the Texas authorities lies in the fact that so dangerous an official as Franco, after having had his appointment as deputy constable cancelled on October 14, 1907, was reappointed shortly afterwards, at any rate before March 4, 1908, this time as deputy sheriff. This reappointment means lack of protection in so serious a form that it amounts to a challenge; it is exactly the reverse from that protection due to all peaceful residents, whether aliens or nationals. Instead of providing the Mexican consul with that security for his person which, according to the quotation from President Fillmore given in paragraph 6 of this opinion, is indispensable to permit a consul to perform his task, it would have exposed him to daily danger if he had stayed at El Paso.

13. There being established that the United States is liable (a) for illegal acts of the deputy constable Franco on October 13, 1907, (b) for denial of justice on the ground of non-execution of the penalty imposed on November 9, 1907, and (c) for lack of protection, there remains to be established what material losses and damages resulted from Franco's second assault. The difficulty before the Commission lies in the problem, whether there is a link between, on the one hand, Mallén's ailments of 1908 and subsequent years up to the present time, together with their financial consequences, and, on the other hand, the events of October, 1907. It has been conclusively shown that in November, 1907, at the time of the second trial, both Mallén and co-counsel Beall only complained about a serious injury sustained by Mallén on the left side of his face as a result of contusion with the car, and that at that time the court did not esteem his injuries serious. It would seem from a receipt, produced among the evidence and relating to professional services by Dr. Anderson at El Paso "from October 13th to November 12, 1907 Surgery for wounded head and face $35.00," that this first treatment ended before the middle of November, 1907. It is established, on the other hand, that on February 2, 1908, Mallén entered a hospital and on February 4, 1908, was operated upon in the right mastoid region by a Mexican physician at Mexico City for ailments which have since disabled him. The only links between these two facts consist in (a) a certificate delivered on July 3, 1908, by Drs. Urrutia and Cañas, the physicians who operated upon Mallén and continued treating him from 1908 to 1912, relating that "the lesion originated in a wound over the temporal region, which, according to the physicians who attended the patient in El Paso, Texas, during the month of October of last year, was a contused wound with a purulent discharge from the ear and probable fracture of the bone, which was the direct and sole cause of the disorder referred to," and (b) a statement of March 9, 1927, by the same Dr. Urrutia and one of November 16, 1926, by Mallén, according to which the Chief Surgeon of the Mexican Army, General Caraza at Mexico City, treated Mallén for about a month, after he left El Paso and before he entered the sanitarium on February 2, 1908, for what Caraza, according to Urrutia, called a cerebral abscess of

traumatic origin. It is true that there is no trace in the record of any new accident to Mallén between November 12, 1907, and February 2, 1908, which might have caused these subsequent troubles of traumatic origin, and that the physicians in Mexico City appear to have considered the connection between the injuries of October, 1907, and their operation on the right mastoid region a natural one. On the other hand, even when not applying to medical certificates the usual requirements of affidavits or legal statements, the present certificate, issued "on petition of the interested party," would seem too vague and incomprehensible to allow the Commission so far-reaching a conclusion as the claimant suggests. The certificate of July 3, 1908, mentions a medical treatment in October, 1907, not a later one; it does not even state who "the physicians" quoted are; Drs. Bush and Vilas seem to be out of the question, and there is no indication whatsoever either of any treatment by Dr. Anderson after November 12, 1907, or of any treatment by a fourth physician at El Paso. If Dr. Anderson had found after November 12, 1907, that the wounds of the left side had developed into a really dangerous ailment on the right side of the head, either the claimant or Dr. Urrutia would not have omitted to produce this surprising discovery of Dr. Anderson's in some way or other, and Dr. Anderson's careful and time-consuming examination of the patient leading to this discovery doubtless would have made its appearance in one of the numerous doctor's bills produced among the evidence. Nor is there any indication relating to General Caraza's views concerning the connection between the injuries of October 13, 1907, the abscess he treated, and the ear troubles and presumable bone fractures for which Mallén went to the hospital; the contention that Caraza treated Mallén for "an infection which resulted from the said wounds" appears in Mallén's affidavit only, not in the physician's statement. The claimant should have furnished some conclusive and pertinent medical testimony about the development of his illness between November 12, 1907, and February 2, 1908; or at least might have produced an expert statement by some high medical authority of the present day establishing the value of the two statements (a) and (b) referred to in the middle of this paragraph. The Commission under the convention would seem not to be warranted in considering as sufficient proofs for a conclusion of this importance statements of so loose and inexplicable a character.

14. When accepting as the basis for an award, in so far as compensatory damages are concerned, the physical injuries inflicted upon Mallén on October 13, 1907, only those damages can be considered as losses or damages caused by Franco which are direct results of the occurrence. While recognizing that an amount should be added as satisfaction for indignity suffered, for lack of protection and for denial of justice, as established heretofore, account should be taken of the fact that very high sums claimed or paid in order to uphold the consular dignity related either to circumstances in which the nation's honor was involved, or to consuls in backward countries

where their position approaches that of the diplomat. The Permanent Court of Arbitration at The Hague in its award of May 22, 1909, in the case of the deserters at Casablanca twice mentioned "the prestige of the consular authority" or "the consular prestige," but especially with reference to conditions in Morocco as they were before France established its protectorate.

15. Taking all these considerations into account, it would seem that an award may properly be made in the amount of $18,000 without interest.

[Concurring opinion of Nielsen, Commissioner, and dissenting opinion of MacGregor, Commissioner, omitted from this JOURNAL.]

Decision

The Commission decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States on behalf of Francisco Mallén, $18,000 (eighteen thousand dollars), without interest.

Done at Washington, D. C., this 27th day of April, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.

FRED K. NIELSEN,
Commissioner.

CORRECTIONAL TRIBUNAL OF THE SEINE

(12TH CHAMBER)

PRINCESS ZIZIANOFF *v.* KAHN AND BIGELOW [1]

April 5, 1927

1. Diplomatic treaties when they are not sufficiently clear and precise can be interpreted by the courts only when they concern private interests; but when the meaning and scope from the public international viewpoint is to be fixed, the interpretation can be given only by the same governments which have made the agreements.

2. Especially, the question of the personal immunity enjoyed by consuls and consular agents under the convention of February 23, 1853, between France and the United States, by the vagueness of its terms is essentially a matter for the interpretation of the American and French Governments in agreement in order to recognize the competence of their respective civil, correctional or criminal courts with regard to consuls' acts (excepting acts done in their official duties), without, moreover, the power of invoking the clause inserted in the said French-American Convention referring to the most-favored-nation (in this case Greece) convention of January 7, 1876, which does not expressly release consular agents of the two contracting countries from jurisdiction of the respective courts of the said countries.

Therefore, the jurisdiction of French courts extends to an American consul cited, not for refusal to visa a passport, which is an official act, but for becoming an accomplice in the offence of libel committed by a newspaper published at Paris by disclosing to the journalist the reasons why he refused to visa a passport when he was not ignorant that these disclosures, illegal under French law, would be reproduced in the press.

THE COURT (M. Weydenmeyer, Presiding):

Whereas by a writ of October 25, 1926, Princess Zizianoff cited Mr. Alexander Kahn, Paris representative of the newspaper, *Boston Sunday Post*,

[1] Translated from the *Gazette du Palais*, May 11, 1927 (No. 131).

Raymond Fendrick, under the name of Robert L. Johnson, and Bigelow, director of the Passport Office of the American Consulate at Paris, for libel, Bigelow being charged with complicity by virtue of the law of July 29, 1881, the said libel resulting from an article which appeared September 5, 1926, under the signature of Robert L. Johnson in the supplement of the said newspaper, published and put on sale at Paris, entitled "Did Beauty Spy on U. S.?"; and the case having been remitted in last instance by a judgment of November 30, 1926, for argument at the hearing of March 22, 1927, she has again by a writ of January 4, 1927, cited the above named and added thereto, on March 8, the newspaper, *Boston Sunday Post*, in the person of its Manager, Richard Crozier, 259 Washington Street, Boston;

Whereas Bigelow denies the jurisdiction of the court; and maintains, in fact, that he cannot be validly cited before the French courts as enjoying personal immunity under the terms of the Consular Convention of February 23, 1854, concluded between France and the United States of America and promulgated in France by a decree of September 11, 1853;

Whereas Article 2 of that convention is thus worded:

> The consuls-general, consuls, vice-consuls or consular agents of the United States and France, shall enjoy in the two countries the privileges usually accorded to their offices, such as personal immunity, except in the case of crime, . . . If, however, the said consuls-general, consuls, vice-consuls or consular agents, are citizens of the country in which they reside; if they are, or become, owners of property there, or engage in commerce, they shall be subject to the same taxes and imposts, and with the reservation of the treatment granted to commercial agents, to the same jurisdiction, as other citizens of the country who are owners of property, or merchants.

Whereas in principle, diplomatic treaties, when they are not sufficiently clear and precise, can be interpreted by the courts only when they concern private interests; while, on the contrary, if the meaning and scope from the public international viewpoint is to be fixed, the interpretation thereof can be given only by the same governments which have made the agreements;

Whereas this proposition has received sanction many times by the courts and especially by a decree of the criminal chamber of the Court of Cassation on February 23, 1912 (*Gaz. Pal.* 1912. 1.454);

Whereas the question of personal immunity enjoyed by consuls arising from the indefiniteness of the expression belongs essentially to governmental interpretation;

Whereas on the occasion of a case concerning an American consul in which the question of personal immunity had been raised, the American and French Governments defined the interpretation that they gave to that question; and this interpretation was recorded in the aforesaid decree of the Court of Cassation expressed as follows:

> Whereas the official interpretation of these provisions, and especially of the words of personal immunity whose meaning and scope were

in dispute in the case, having been requested of the government in order to be produced at the trial, the Department of Foreign Affairs made known by letters of November 25 and December 4, 1911, referring also to a preceding communication of June 21, 1909, that there was complete agreement between the two Powers on the question of principle; and that it appeared from their bilateral interpretation that the sentence on personal immunity of consular agents should be understood not as an immunity from territorial jurisdiction in criminal matters, but only as an exemption from arrest and preliminary detention;

Whereas it is true that the American Government, by a letter from the Ambassador of the United States to the Minister of Foreign Affairs, dated March 5, 1927, which has been set out by the attorney for Bigelow in his plea, and a copy of which has been communicated to the court by the attorney for the Republic, has declared that it did not accept the view taken in the note of June 19, 1909, from the Foreign Office to Ambassador White, according to which the personal immunity provided in Article 2 of the treaty concerned only "exemption from arrest and preliminary detention." The Department considers that the phrase in question was intended to ensure to American consuls in France and French consuls in the United States immunity from arrest or imprisonment in all cases, except cases in which consuls are accused of crimes proper, that in consequence it "cannot consider as conforming to its views the affirmation by the *Cour de Cassation* that the convention of 1853 has been the object of a bilateral interpretation by the interested governments";

But whereas, in the same letter of March 5, 1927, the Ambassador of the United States expresses himself thus: "In other words, the Department considers that this provision (personal immunity) was intended to ensure immunity from arrest or imprisonment under the judgment of a court as well as preventive arrest or imprisonment"; and whereas it follows that, apart from the divergence relative to exemption from arrest and detention, the two governments, American and French, are in accord in recognizing the competence of their respective civil, correctional and criminal courts with regard to the acts of consuls, with the exception, of course, of acts in their official capacities; since the letter of the American Ambassador contemplates the case of an arrest or an imprisonment in virtue of a judgment, it necessarily implies the appearance of the consular agent before a court;

Whereas, moreover, such was previously the interpretation of the Government of the United States; and indeed in a letter of October 4, 1926, from the Ministry of Foreign Affairs to M[e] Thomas Olivéra, *huissier* acting for Princess Zizianoff, it is said that the American Embassy at Paris, in its memorandum addressed to the Ministry of Foreign Affairs of June 12, 1909, recalls that it is the doctrine and constant practice in the United States that consuls are not free from the jurisdiction of local tribunals under international law; it declares that "the Department of State at Washington interprets the Consular Convention with France as not derogating from this

doctrine and holds that the convention gives a consul immunity from suit only as to his official acts and capacity";

Whereas, moreover, Bigelow contends that any doubt disappears by application of the most-favored-nation clause which refers expressly to immunities, and he points to the convention of January 7, 1876 between France and Greece;

Whereas Article 12 of the Franco-American convention of February 23, 1853, provides that "the respective consuls-general, consuls, vice-consuls or consular agents, as well as their consular pupils, chancellors, and secretaries, shall enjoy in the two countries all the other privileges, exemptions and immunities which may at any future time be granted to the agents of the same rank of the most favored nation"; and according to Article 8 of the Consular Convention concluded January 7, 1876, between France and Greece, "Consuls-general, consuls, student consuls, chancellors, and vice-consuls, or consular pupils, if citizens of the state appointing them, shall enjoy personal immunity; they cannot be arrested or imprisoned except for actions which the penal legislation of the country of their residence defines as crimes and punishes as such; if they are in business, physical constraint can be applied to them only for acts done in business";

But whereas if the convention between France and Greece expressly mentions exemption from arrest and imprisonment, as is not done in the convention between France and the United States, it does not free in an express way the consular agents of the two contracting countries from the jurisdiction of the respective courts of the said countries, and it follows that it does not modify in any way the interpretation above reproduced of the expression "personal immunity";

Whereas, finally and contingently, Bigelow maintains that in case the tribunal rejects his objection of lack of jurisdiction based on personal immunity, it ought to declare itself incompetent nonetheless, on the ground that under the law of nations consuls can never be cited before the courts of the country to which they are accredited by reason of acts of their offices or even of misdeeds connected with those acts;

Whereas Bigelow is not cited for a refusal to visa a passport, an act essentially official, for which the court would undoubtedly be without jurisdiction and which, moreover, would not constitute any criminal offence, but for becoming an accomplice to the offence of libel, with which Princess Zizianoff charges Kahn and Fendrick, by furnishing to these men an interview affording them the means to commit it;

Whereas it is not possible to consider that Bigelow, in the hypothesis that the act be established, has performed an official act in revealing to third persons the reasons why he refused to visa the passport of Princess Zizianoff; indeed he would not be within the limits of his functions in making known why he had taken this decision and especially so because in addressing journalists he could not but know that his remarks would be reproduced in

the press and would, in consequence, be likely to give rise to acts contrary to French laws; that he has thus acted, not as a consul, but as a private person on his own responsibility, and consequently not protected by immunity by reason of official acts and he has no legal ground to ask the court to declare itself incompetent;

Whereas, in these conditions, in whatever way the office be viewed, the tribunal should declare itself competent;

For these reasons,

Declares itself competent with regard to Bigelow;

Sets the case for July 1, 1927, to be pleaded on its merits;

Condemns Bigelow in the costs of the process.

M. Compans, Deputy Public Prosecutor.—M[es] de Moro-Giafferi and Rosenmark, attorneys.

NOTE.—I. On the first point: Unvarying precedents in this sense: *V. Cons. d'Etat*, 27 January, 1922 (*Gaz. Pal.* 1922. 1.282), and the note with citations; *Cass.* 22 March, 1923 (*Gaz. Trib.* 29 April, 1923); 2 June, 1923 (*Gaz. Pal.* 1923.2.220) and the note; 9 August, 1923 (S. 1924, 1.89); *rappr. Cass.* 23 February, 1912 (*Gaz. Pal.* 1912, 1.454); 25 September, 1919 (*Gaz. Pal.* 1919. 2.353).

II. On the second point: For the terms of the decree of 13 *ventôse an* II, prohibiting interference in any way with the person of envoys of foreign governments, diplomatic agents are not subject, as a general rule, to the jurisdiction of French courts: *Cass.* 3 August, 1921 (*Gaz. Pal.* 1921.2.521); even for acts unconnected with their mission. It has even been decided that this incompetence was a matter of public order: *Trib. civ. Seine*, 23 March, 1907 (*Gaz. Pal.* 1907.1.539—D. 1907.2.281 and the note of M. Politis with references to writings and decisions).

But for foreign consuls, immunity is strictly limited to official acts: Paris, 14 December, 1911 (*Gaz. Pal.* 1912.1.27), and on appeal *Cass.* 23 February, 1912 (*Gaz. Pal.* 1912.1.454); *Trib. civ. Seine*, 24 July, 1912 (*Gaz. Pal.* 1912.2. 511) and the note; *Trib. com. Marseille*, 29 January, 1924 (*Rec. Marseille* 1925, 1.315). Also Paris, 9 April, 1925 (*Gaz. Trib.* 22 May, 1925); 19 November, 1926 (*Gaz. Pal.* 1927, 1.165); Dalloz, Supplém. to the *Rép.*, *v° Consul*, n° 7 *et seq.* On the consular convention between the United States and France, of 23 February, 1853, see the decree of 11 September, 1853 (D. 53.4.214).

BOOK REVIEWS*

Recueil des Cours, 1925. Académie de Droit International. Paris: Librairie Hachette, 1926. 3 vols. Vol. I, pp. iv, 472; Vol. II, pp. iv, 525; Vol. III, pp. iv, 555. Indices.

These volumes contain the lectures delivered at the Hague Academy of International Law at its session in 1925 and constitute volumes 6, 7, and 8 of the general collection, the first five volumes of which were reviewed in the October, 1925, issue of this JOURNAL. In arrangement the present volumes conform to the plan followed in the earlier volumes, the lectures being preceded by a photograph of the lecturer, a biographical sketch and a list of his principal publications, and followed by a bibliography of the principal authorities and sources of information on the subject treated in the lectures. Fifteen persons delivered lectures at the 1925 session of the Academy, representing nine different countries, as follows: France, 4 (Goyau, Boegner, Jèze, and Pillet); Germany, 2 (Strupp and Wehberg); the United States, 2 (Hudson and Kuhn); Belgium, 1 (de Visscher); Russia, 1 (Heyking); Italy, 1 (Rapisardi-Mirabelli); the Netherlands, 1 (van der Vlugt); Great Britain, 1 (G. G. Phillimore) and Uruguay, 1 (Guani). As in former years, the lectures deal with public international law, strictly speaking, private international law, international relations, international policy and political theory.

M. Politis, whose lectures occupy the first place in the volumes under review, deals with the subject of the limitations on sovereignty and the theory of the abuse of rights in international relations. His general thesis is that the notion of absolute sovereignty of states has proven a formidable obstacle to the organization of the world for the preservation of the peace and the advancement of other common interests; that the most important questions today in the international life of the world are economic in character and they are the ones most likely to cause war; that there is an urgent need for new rules to prevent controversies from arising between states and for settling peaceably those which it has not been possible to prevent.

M. Goyau's lectures deal with the relation of the Roman Catholic Church to the law of nations. He discusses the political theory and summarizes the teachings of the Church Fathers and the Mediæval and later theologians in regard to war, the rôle of the papacy in the life of Christianity, the service rendered by the pope as an arbitrator and mediator, etc. M. Boegner, himself a cleric, attempts an evaluation of the influence of the Reformation upon the development of international law and especially the law of nature and upon the progress of the solidarity of nations—an influence which he thinks was very considerable.

* The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.—ED.

The lectures of Professor de Visscher, a member of the Committee of Jurists on the Progressive Codification of International Law, deal with the subject of codification of international law. He considers in turn the fundamental notions relative to codification, the advantages claimed for it, the history of the movement for codification, the individual and collective projects that have been elaborated, the progress already achieved and the difficulties that must be overcome before the task is achieved.

Dr. Wehberg's lectures contain a critical examination and commentary on the Geneva Protocol, the elaboration of which he thinks deserves a place in the history of pacific regulation alongside the Hague Conventions, the Bryan treaties and the Covenant of the League of Nations. Dr. Wehberg admits that the Protocol was not without its defects, but withal it represented a great step in advance—the greatest step in the progress of arbitration ever taken. Although never ratified, the time and effort expended in its elaboration were not lost; it furnished a model or basis for the future development of pacific regulation and is certain to exert a decisive influence upon the future progress of the moral forces of humanity.

Professor Jèze's lectures deal with the general subject of international financial control of backward or bankrupt-threatened states: forms of guarantee, the juridical and political problems involved, the past policies of states, the history of international control, etc. His conclusion is that the League of Nations is destined to assume in the future the exercise of such control as may be necessary in Europe, while on the western hemisphere it will probably be assumed by the United States. By whomsoever it is exercised it should, he says, be exercised not only in the interest of creditors but of debtors as well. Professor Strupp's lectures dealing with intervention in financial matters were along the same line, although he treated the subject more from the historical point of view. He classified the instances of such intervention as: (1) those in which the legality of the action taken was a matter of controversy, (2) those in which it was clearly illegal, and (3) those in which it was justified by necessity.

Baron Heyking's lectures deal with the subject of extraterritoriality; those of Signor Rapisardi-Mirabelli with the general theory of international relations, those of Mr. van Vlugt with the work of Grotius and his influence on the development of international law; those of Mr. Kuhn with the status of negotiable instruments in international law; and those of Professor Pillet, in whose recent death international law has sustained an irreparable loss, with international law and vested rights.

Mr. G. G. Phillimore, the only English representative on the Academy staff for 1925 and who, like the lamented Pillet, has also passed away since his lectures were delivered, discussed the subject of immunity of states from judicial process. Contrasting the Anglo-American and Continental doctrines, he points out what English and American writers are coming more and more to recognize, namely, that the Anglo-American doctrine of the

non-suability of the state in matters of tort is unsatisfactory, antiquated, and without logical basis. Considering that states today are engaging in business on a large scale, he expresses the opinion that the "superannuated principle" of immunity based on sovereignty ought to be replaced by the more modern and common sense doctrine of the responsibility of the state and its liability to actions for damages sustained by private individuals in consequence of its torts.

M. Guani, the only Latin-American jurist who lectured at the Academy in 1925 (now President of the Assembly of the League of Nations), discussed the development of international solidarity and the progress of international law in Latin America. More specifically he reviewed the projects of confederation of the Latin-American states that have been proposed, the work of the Pan-American Conferences, the progress of Pan-Americanism, the Drago doctrine, the development and extension of the principle of arbitration in Latin America, the participation of the Latin-American states in the League of Nations, etc.

The three volumes here reviewed, like those which preceded them, constitute a very valuable contribution to the literature of international law, containing as they do the results of the researches and the conclusions of a group of eminent scholars in their respective fields.

J. W. GARNER.

The International Controls of Public Finances: A Treatise of International Law. By Mr. H. M. Alvares Correa. Amsterdam: M. J. Portielje, 1926. pp. xiii, 192.

This book treats the subject, not from the standpoint of economics, but of international law. It deals with the procedure that is followed when a state that cannot pay its debts, or is unlikely to do so, is placed under a form of control. This control is not identical with the legal guardianship of a trustee in the case of an individual who goes into bankruptcy, but is an analogous arrangement for a supervision which is more or less effective according to circumstances.

When a state is in debt, control is established: (1) by the spontaneous action of the state itself without an agreement with an outside party, (2) by binding itself to foreign individuals, or (3) by obligating itself by treaty to other Powers. A general rule is difficult to make, but negatively speaking, states cannot legally be subjected to financial control without their consent. The spontaneous arrangement for control is apparently of small juridical value, as it may be abolished or modified by the state itself. An engagement of a state towards foreign individuals may or may not legally be abrogated or modified without their consent; there is some doubt in regard to the matter. Control based on an engagement towards other Powers cannot legally be abrogated or changed without their consent, but it may be in fact; and, therefore, a spontaneous obligation is, out of self-interest if for no other rea-

son, sometimes of more actual value than either of the other forms of control which appear to have more juridical value.

The writer takes up the cases of thirteen debtor states, giving considerable space to Austria, Hungary, China, and Egypt, where elaborate supervisory systems are in effect; with some attention to Santo Domingo, Haiti, Nicaragua, and Honduras, states nearer home, with whose financial systems the United States has lately become connected. He compiles thirteen small monographs with lists of the sources of his information at the head of each, tells how the controls in each case originated, and explains the various ways in which they operate. There then follows a summary of the author's findings and comparisons of the various forms of control as well as of their execution. This book lacks the human interest which attaches to many topics in international law; but, in an age of debtor states and of reconstruction after wars or revolutions, it is needed to supply information that is lacking and it is a good foundation for an extended study of the subject treated.

J. L. TRYON.

Archangel—The American War With Russia. By a Chronicler. Chicago: A. C. McClurg & Co., 1924. pp. 216.

Here is a readable account of the American participation in the Archangel expedition of 1918–1919, by an American soldier who was a member thereof. The United States and Russia have happily never been at war with each other. Hence the title of the work, and the author's constant reference to the campaign as a war upon Russia, do not serve to enhance respect for his conclusions. Despite his candor, the author's treatment of the "objects" of the expedition is hardly satisfactory. While ready enough to set out what he understands those objects to have been, he is perplexed by, and despondent over, the circumstance that the movement continued after the signing of the armistice on November 11, 1918, and that "the most sanguinary battles in North Russia were fought in the dark winter months that followed" (p. 28). He deplores those conflicts, and in particular the military necessity that demanded the destruction of villages up the Dvina River. Obviously, it will be contended in response, that the expedition was not internationally illegal in inception or operation, and that possessing such a character, the numerous conflicts between American and Russian forces in the winter of 1918–1919, and the acts deemed necessary to safeguard the former from destruction by the Bolshevik armies, were not lawless. The author admits, on page 85, that "even when the Americans reached Archangel in September, the campaign had already assumed a defensive character," and on page 95, that when the British General Ironside assumed the office of Commander-in-Chief (which was in the autumn of 1918) "the 'offensive war' was heard of no more."

In his account of the movements on the several fronts, involving advances

southward on the Archangel-Vologda Railway and in the areas traversed by the Onega, the Pinega and the Dvina Rivers and the streams tributary to the Dvina, the author has produced a highly interesting narrative. This is the best part of the book, and comprises the major portion of it. In the course of his story the author is critical of the military as well as political scheme that caused little forces to penetrate deep into a frigid country, where they received frail support from the inhabitants and where they encountered the vigorous opposition of the Bolsheviks, by whom they were greatly outnumbered and at whose hands they narrowly escaped annihilation. Notwithstanding his dislike of the campaign, the author refers, on page 116, to the departure of the American troops in June, 1919, as an "ignoble quitting," and as apparently a betrayal to the Bolsheviks of those "loyal Russians who had placed their trust in the promised salvation of the Allied leaders" (p. 204) and who were the backbone of the so-called Archangel Government. In this connection he declares, on page 211, that "there was not a man in the ranks who did not sense the disgrace in our ignoble desertion, there was not an American officer who would not have chosen to have left his bones bleaching white beneath Archangel snows, than been a living witness to the ignominious way in which his country quit and slunk away."

The sentence last quoted is not the only one in which the author has failed to have a nice regard for the grammatical requirements of the English language. On page 13 Charles R. Crane, a member of the American Commission sent to Russia by the President in 1917, is inadvertently referred to as Charles *P.* Crane. On page 44 the town of Soroka is said to lie "east" of Archangel. It happens to be west thereof. On page 54, the town of Vologda is assigned to a position "nearly due east" of Viatka, when in fact it lies in the opposite direction. Notwithstanding these lapses, and the injection of conclusions which may fairly be challenged, the author has written an intensely interesting work, which those who are readiest to criticize may read with profit. A photograph of Sergeant William H. Bowman, 339th United States Infantry, who died of wounds received in the action of March 1, 1919, near Toulgas, and to whose memory the book is dedicated, forms an appropriate frontispiece. The book contains eleven other photographic illustrations and three maps.

CHARLES CHENEY HYDE.

Pinckney's Treaty: A Study of America's Advantage from Europe's Distress, 1783–1800. The Albert Shaw Lectures on Diplomatic History, 1926. By Samuel Flagg Bemis. Baltimore: The Johns Hopkins Press, 1926. pp. xii, 421. Index. $3.00.

Ever since the appearance in 1899 of Professor John H. Latané's *Diplomatic Relations of the United States and Spanish America*, the initial volume of the series of the Albert Shaw Lectures on Diplomatic History at Johns Hopkins University, students of international relations have come to regard

the Shaw Lectureship as an intimate source of productive scholarship, and have eagerly awaited forthcoming volumes, which are published under Professor Latané's direction, of which *Pinckney's Treaty* is the twelfth. Professor Latané's introductory volume touched a Spanish-American theme to which this twelfth volume is a fitting sequel that is nicely related to six of the intervening contributions, namely those of Professors Jesse S. Reeves, Elbert J. Benton, Ephraim D. Adams, Isaac J. Cox, William R. Manning, and Percy A. Martin, all of which treat of American diplomatic relations with Spain or with Latin-America. Hence, Professor Bemis' treatise is significant for two causes in particular: its additional revelation of Spanish-American diplomacy; and its bridging of a gap in historical writing that still remained in 1923 upon the publication of his *Jay's Treaty: a Study in Commerce and Diplomacy*. Furthermore, the thesis has been awarded the Pulitzer Prize.

Heretofore neglected by historians, this romantic story of 1783–1800 is unfolded by Professor Bemis in thirteen chapters treating of the origin of the Mississippi question and the boundary dispute, the activities of Gardoqui and Jay and of James Wilkinson and the Spanish conspiracy, the attitude of Congress and the negotiations, the Spanish policy and the American West, and Godoy's propositions for the President. Illustrative material is supplied in five appendices and five maps. The former present the financial debt of the United States to Spain and its payment, Mr. Pinckney's sketch of a treaty and drafts of prepared articles as well as the official text of the Treaty of 1795. A particularly interesting bit of intrigue is suggested in a facsimile photograph of an account rendered to Spain by General James Wilkinson "requesting payment for his services as a Spanish vassal and pensioned in stirring up sedition in Kentucky."

Personality interpretations add human interest to the subject in various places without seriously detracting from the major forces involved; for example biographical sketches of Diego de Gardoqui and of William Short, and a characterization of General Wilkinson as a "thorough liar" and "Companion of Benedict Arnold and Aaron Burr." Esoteric diplomatic administrative policy and procedure is revealed intermittently by the activities of diplomatic couriers, the conflict in policy as to whether a special diplomat or a career diplomatist should be appointed, and the intrigues of diplomatic profiteers, of whom "Many a Wilkinson, Morgan, Steuben, Lee, Brown, White was willing to travel outside the orbit of patriotic loyalty to the United States, provided the path led toward personal emolument and fame."

These sidelights and little ventures into subjectivity, however, are not fatal to the author's scholarship. Written almost exclusively from original sources, both American and foreign, the work is logically organized with objectivity and perspective and rendered into a masterpiece of readable style. Some errors in details have already been corrected by Professor

Bemis himself in the *American Historical Review*, April, 1927, and in the *Hispanic American Historical Review*, August, 1927.

MILTON CONOVER.

Los Precursores de la Diplomacia Mexicana. By Isidro Fabela (Archivo Histórico Diplomático Mexicano, Num. 20). Mexico: Secretaría de Relaciones Exteriores, 1926. pp. iv, 207.

This book, unbound as others in the series, consists of 29 unnumbered chapters or sections, most of them from two to five pages in length, each having its own caption. Nearly every section consists of a brief sketch of the public career of an individual of some importance, principally early revolutionary agents, and many sections quote one or more documents written by the respective subjects of the sketches. Two sections antedate the general emancipation movement. The first recounts efforts of so-called Mexican revolutionary agents to obtain British aid against Spain in 1742, 1765, and 1766, and the second tells of efforts of a commission led by Don Francisco de Mendiola in 1875 [1775?] to induce the court of George III to aid in liberating New Spain from Spain. One section on "Napoleon and Spanish America" quotes a document addressed by his prime minister to his plenipotentiary in Washington in 1811, in which the following significant statement is made: "The intention of His Majesty, the Emperor, is to favor this general movement and give support to the emancipation of all the Americas." The most extended section, the only one which really deserves to be called a chapter, entitled "The First Accredited Diplomat in Mexico: Don Miguel Santa Maria," quotes 15 notes exchanged between him and Mexican officials. The following chapter entitled "The return of Plenipotentiary Santa Maria," contains, besides a few papers relating to his retirement, the full text of the Treaty of Union, League, and Perpetual Confederation between Mexico and Colombia, signed by him and the Mexican negotiator, Lucas Alamán, on October 3, 1823. There is no index. The table of contents, entitled "Indice," on the last page of the volume, is merely a list of the section headings.

WILLIAM R. MANNING.

Manuel Élémentaire de Droit International Public. By René Foignet. Treizième édition. Paris: Rousseau et Cie., 1926. pp. iv, 706. Index.

This is a revised edition of a manual designed, as the author says, "for the use of law students and candidates for the diplomatic and consular services." It has been brought up to date and enlarged by the addition of new material dealing with events since the World War. Like other French manuals it is a model of clearness and condensation, following the beaten path in its classifications and dividing and subdividing its headings with logical exactness. In point of method it is less concerned with trying to determine what is the actual rule of conduct upon specific points than with laying down general prin-

ciples and citing such international practice as is in conformity with them. The historical material is thus particularly full. There is the usual discussion of theory common in French treatises, and a tendency, also common to most Continental texts, to lay down general rules based upon the assumption that what *should* be the rule of international conduct *is* the rule whether or not practice conforms to it. A long series of examination questions, followed by analytical tables, completes the volume.

To American students the value of the manual will consist principally in the discussion of events since the World War. American and English texts are apt to concentrate too largely upon Anglo-Saxon practice. French texts, on the other hand, are primarily concerned with what happens upon the continent of Europe, so that the present volume contains a wealth of detail with regard to recent treaties, conventions and other incidents of international intercourse. The chapter on the history of international law gives a full discussion of the Treaty of Versailles, while that on the League of Nations is an unusually good summary of the organization and functions of the League and of the work that has already been accomplished by it. In contrast, the space allotted to the Permanent Court of International Justice seems somewhat meagre.

Perhaps it is too much to expect that in a manual of this kind there should be any critical discussion of the fundamental principles of international law or of specific rules. Yet the chapter heading on "The Absolute Rights of States" suggests that the author is not even aware that the older theories of absolute, natural, and fundamental rights are being reconsidered in the light of modern facts. More serious is the strongly nationalistic tone at times assumed by the author,—the Treaty of Versailles was "a peace of justice and of right"; it would have been "conformable to the most elementary sense of justice" to have made Germany pay the expenses of the war (in addition, no doubt, to the "reparations"!); England is "the only Power which can congratulate itself on the results of the Treaty of Versailles"; the very word "disarmament" in the presence of German bad faith has (citing Pillet) an impious sound; and, as if French youths had no sense of humor, some lines are quoted from La Fontaine's fable of the wolf and the lamb.

C. G. Fenwick.

The Struggle for the Falkland Islands. By Julius Goebel, Jr. New Haven: Yale University Press, 1927. pp. xiii, 482. *il.* Index. $5.00.

Although the title chosen by Dr. Goebel would appear to limit his subject to a discussion of the famous controversy regarding the conflicting claims of Spain, France, and Great Britain to the legal sovereignty of the Falkland Islands, the field he covers with scholarly thoroughness actually includes matters of far wider interest. In addition to a searching review of the development of international law doctrines concerning discovery and occupancy of new territory, Dr. Goebel offers a full statement of the his-

torical background so necessary, yet so often omitted, in treating diplomatic questions of this character. The student of international law, and notably, the specialist in the diplomatic history of the colonization of the two Americas, will welcome this first thorough exposition of the interesting Falkland Islands controversy, and especially the full documentation offered regarding early discoveries and voyages near the Straits of Magellan.

Dr. Goebel's account of the beginnings of Great Britain's present outstanding foreign policy (which has so largely figured in the recent Geneva Conference of Disarmament) is of timely interest. It was "Mr. Walter," Chaplain of the Fleets during the Naval Wars of 1748, who first proposed a settlement either on "Pepys Island" or the Falklands as "a convenient station" for the British fleets passing into the Pacific by means of the Straits of Magellan. Negotiation with Spain was subsequently entered into to enable "a scientific expedition" (sic) to visit these islands, and in spite of Spanish suspicions the matter was arranged. The outbreak of the Seven Years' War postponed further peaceful penetration, and in the meanwhile the first actual settlement was made, not by the British, but by the French under Bougainville, who erected a fort named St. Louis on the East Falklands on March 17, 1764. The planting of the French colony was observed by Spain with no little disquiet, while the British Government, which continued to manifest an interest in this out-of-way locality, sent Commodore John Byron of the H. M. S. *Dolphin* to examine "His Majesty's islands, called Falklands, and Pepys Island," to determine a suitable place for a settlement of their own. A typical incident occurred, when, to his surprise, Byron was finally obliged to conclude that no such islands as those called "Pepys" actually existed except as part of the Falklands. He had even considerable difficulty in finding the islands recognized as the Falklands themselves. Finally, at a place which he named Port Egmont, he "took possession for His Majesty, King George Third of Great Britain by the name Falkland Islands." He seems to have been unaware of the French colony already existing until his return to Europe. The admiralty, however, were satisfied that this expedition had placed in their hands, as Lord Egmont stated, "the key to the whole Pacifick Ocean."

Within the next few years the barren and empty Falklands were destined to become "Delectable Isles," desired by three great Powers. On several occasions between the years 1768 and 1774, Great Britain, France, and Spain were on the verge of war concerning their possession. In 1777 Port Egmont was captured by a Spanish expedition, and an attempt was made to found a colony depending on Buenos Aires. On January 22, 1771, after treasures of eloquence and legal learning had been wasted upon the subject in Parliament, a secret and somewhat obscure agreement was arrived at by which the British consented to withdraw. Physical abandonment took place on May 20, 1774, although a lead plate destined to be the basis of further claims was affixed to the block house by the retiring British with an inscription

stating that the "Falkland Islands are still the sole right and property of Great Britain."

A carefully reasoned chapter on the ensuing legal "struggle for sovereignty" forms the heart of Dr. Goebel's thesis. Space is lacking to consider the merit of his argument here. Skilfully connecting his legal exposition with the diplomatic history of the time, he notices the importance of the Nootka Sound convention, reviving the basic questions involved in the Falkland Island dispute, and seems to suggest their interesting significance in connection with the "non-colonization clause" of the Monroe Doctrine.

It is to be regretted that Dr. Goebel, in dealing with the more recent aspects of his subject, has somewhat abridged the exhaustive method used in his previous chapters. The actual interest of the Falkland Islands controversy to American readers largely turns upon the diplomacy of the Jacksonian period, which the author briefly criticises with some severity. A thorough study of the reasons that led the United States to acquiesce in the British reoccupation of the Falkland Islands, a subject last touched upon in President Cleveland's message of 1884, might, in itself, furnish ample material for a further monograph of value and significance.

W. P. Cresson.

Société des Nations et Problème de la Paix. By Miroslas Gonsiorowski. Paris: Rousseau & Cie., 1927. Tome I, pp. 508; Tome II, pp. 547. Fr. 80.

In this notable work, dedicated to his wife, the author presents one of the most comprehensive available studies of the peace problem. As the title suggests, considerable attention is given to the League of Nations. The author states in a foreword that "the problem of peace is allied so closely with the League of Nations that it is impossible to examine the first and pass in silence the second." He adds that the study is "the more necessary since there does not exist a work completely consecrated to this subject and taking account of actual international life." It may be granted that few works exist which attempt so ambitious a task as here essayed, though material on peace and the League is abundant.

Volume I contains a useful bibliography of 15 pages arranged alphabetically by authors; no attempt is made to classify the titles by topic or subject-matter. The list of works draws from most leading nations and covers the entire problem of peace. While the bibliography is rather extensive, some conspicuous omissions may be noted, such as Potter's study on *International Organization* and Rappard's *International Relations as Viewed from Geneva.*

Volume I, Book I, deals principally with international organization, chapters being devoted to "International Political Organization" and to "International Juridical Organization." Under the former head occurs a chapter on the international administration of the Saar Basin and the Free

City of Danzig. Attention is given to the history of international organization in the past and especially to the League machinery and the related organizations. The author looks with favor on regional groupings, provided they are not inconsistent with the League undertakings; he would have the League encourage such groups. While he favors a United States of Europe, he emphasizes that he would have the League remain charged with all problems clearly international in scope. Neutralization of a state by a group of states would violate the Covenant, but the exceptional case of Switzerland is recognized. Common action by the League must always be paramount to action by regional groups if the prestige of the League is at stake.

Article 21 of the Covenant and the Monroe Doctrine are treated at some length. The original text of the doctrine with Monroe's interpretation is approved by the author, but he does not approve the consistency of the Cleveland and Roosevelt interpretations *vis-à-vis* that of Monroe. President Wilson's announcement, January 22, 1917, that the doctrine of Monroe should be made a world doctrine was a happy occurrence, and Wilson's interpretation of the doctrine as preventing outside interference with the territorial integrity, political independence, and liberties of the peoples of the American continent, is in accord with the original conception of Monroe. The League may intervene in America, and the American States which are members of the League may intervene in Europe but as League members rather than individual states. The Wilsonian conception of the doctrine is compatible with the Covenant, but the rendering of the doctrine by other of the United States presidents making it mean America for the United States, is not compatible with the League engagements.

The second part of Volume I deals with International Juridical Organization, 92 pages being devoted to the Permanent Court of International Justice. This court is treated under the headings of organization, competence, procedure, sanctions, and conclusions. Regarding the sanctions of the court, the author remarks that Article 418 of the Versailles Treaty (providing a possible economic boycott by the court in labor matters) is the exceptional case where the court is clothed with power to employ a sanction. Any other sanction powers must come from the Covenant. The author concludes that Articles 12 and 13 would afford a sanction for decisions of the court, but as to Article 13, the proposals of the Council would be morally, not legally, binding. Article 16 would not apply unless the refractory state actually went to war. The sanction articles need clarification.

In Volume II, under the general heading "Preliminary Guaranties of Peace," the author considers nationalities, colonial problems, social problems, disarmament, publication of treaties, guaranty of territorial integrity and political independence, and revision of treaties. The second part of this Volume, under the general heading "The Pacific Settlement of International Disputes," deals with pacific settlement methods before and after the

creation of the League, sanctions, treaties of mutual assistance, the Geneva Protocol, and the accords of Locarno. The text of the League of Nations Covenant is given.

In concluding Dr. Gonsiorowski states that the progress realized since the World War has been immense, a formidable reaction being noted in the universal conscience towards the efforts of those who would substitute peace for war. There is need for further development of an international spirit in the masses of the people; the truth should be exalted and peace methods pointed out. The author has given to the literature concerning world peace and world organization a distinct, constructive contribution. A useful and scholarly attack on a big problem.

JOHN EUGENE HARLEY.

The Problem of a World Court. By David Jayne Hill. New York: Longmans, Green and Co., 1927. pp. xxvi, 204. Index. $1.75.

The problem of a World Court, as presented by Dr. David Jayne Hill in this volume, is the problem, from the point of view of the United States, of transforming the existing League Court of Justice into a World Court of Justice in which all the nations of the world may participate on a basis of equality, entirely free and distinct from the organization and political activities of the League of Nations. Dr. Hill is preëminently qualified to discuss this problem in its legal and historical aspects, and the records and arguments which he has presented in this volume demonstrate his sympathetic attitude toward the establishment of an International Court of Justice, and indeed he strongly advocates constructive measures for the transformation of the League's Court into a World Court of Justice with jurisdiction over all justiciable questions in controversies between the United States and other nations.

In presenting his subject Dr. Hill deals first with the origin and development of the idea of a Court of International Justice. This idea, he shows, was of American origin, as has so often been proclaimed, and that it grew out of the basic American principle of self-government by separate States and their moral accountability to one another under laws voluntarily agreed upon and accepted by them. He follows the development of this idea through the two Hague Conferences of 1899 and 1907 and then discusses the unfortunate consequences of the attempted appropriation of this idea by the League for its own purposes, in disregard of the most important objects of this idea as envisioned by its projectors and supporters in the United States. He shows that the Permanent Court of International Justice established by the League of Nations fails to realize the objects aimed at in the instructions to the American delegates at the two Hague Conferences, because it is a Court entirely without compulsory jurisdiction even for the most simple justiciable cases, except as between nations which by agreement confer special jurisdiction upon it, and also because it may exercise unrestricted jurisdiction as an

advisory agent of the League in giving advisory opinions on any question, whether political or legal, or merely a question of policy, submitted to it by the Council or Assembly of the League.

He presents two fundamental objections to the League's Court as disqualifications for its undertaking to function as a real World Court of Justice. One of these objections is that the League Court is bound up in the organization of the League of Nations and subject to its control under the terms of the League Covenant for reasons which are fully and forcefully set forth in this volume, and that so long as this dependence is maintained it cannot function as a Court of Justice for nations not members of the League. Dr. Hill's discussion of this aspect of the problem is an exceedingly valuable contribution to the clarification of that issue.

His other fundamental objection to the League's Court as a World Court of International Justice is that in establishing it the members of the League, on the advice of the Council of the League, have adopted what might conveniently be called League law, instead of international law, as the basis of international justice. Dr. Hill points out that from the outset the leaders in the American movement for an International Court of Justice have assumed that it must be governed in its decisions by a code of law adapted to its use and that the essential pre-condition of a real court of legal justice is the "further codification of the universal ideas of right and justice which we call international law."

The Commission of Jurists, of which Mr. Root was a member and which prepared at The Hague in 1920 a project for the League's Court, recognizing the necessity for the codification of the law which shall govern the decisions by an International Court of Justice, attached to their plan the recommendation "that a new conference of the nations in continuation of the first two conferences at The Hague be held as soon as practicable" for the express purpose of proceeding with the codification of the law of nations. Dr. Hill points out that this recommendation was wholly disregarded by the Council of the League in dealing with the Court project, although the Council has since then determined itself to supervise the codification of international law, taking care, however, that the process does not proceed so far as to effect the vital interests of the League. Dr. Hill concludes on this point by stating that the future growth of international law is not to be determined by the free acts of governments but by a League controlled process of codification.

Meanwhile the League's Court of Justice is to be free to exercise, in effect, international legislative powers through the process of judicial legislation.

Dr. Hill reviews in considerable detail the proposals which were made during the League Court controversy by Senators Lenroot, Lodge and Pepper for the reorganization of the League's Court into a genuine World Court. He makes it clear that these proposals were all constructive efforts to transform the League's Court in such a manner that it would become in a true sense a

World Court "in which all nations regarded as members of the society of civilized and responsible nations might have a part on terms of equality." He adds, in view of the unfriendly and superior attitude of the advocates of American entrance into the League of Nations toward these proposals, that "it was not without a certain feeling of discouragement that the friends of these last named efforts to reorganize the League's Court so as to make it a veritable World Court of Justice, found their endeavors reproached with the accusation of a lack of sincerity. It was a cruel and wholly unjustified reproach."

Dr. Hill also reviews at some length the most important of the numerous reservations which have been proposed, with a view of enabling the United States to adhere to the League's Court Protocol without assuming any legal relations or obligations to the League of Nations, including the reservations finally approved by the Senate in its Resolution of January 27, 1926. The report of the committee of experts appointed by the Council on March 10, 1926, to deal with the five Senate reservations, and a new draft "Protocol of Execution" proposed as a result of the Geneva Conference of the Signatories of the original protocol of adhesion, which followed the refusal of the United States Government to accept an invitation from the League to enter upon negotiations under the auspices of the League, are analyzed and fully discussed by Dr. Hill, with especial reference to the fifth reservation, which precluded the League's Court from entertaining any request for an advisory opinion, without the consent of the United States, "touching any dispute or question in which the United States has or claims an interest."

In Dr. Hill's opinion, the fifth reservation does not ask on the part of the United States for "equality with members of the League, who are loaded with the obligations and responsibilities of the Covenant of the League," but it implies that "this tribunal is a 'World Court', that is, a tribunal regulated solely by the Statute of the Court, without any relation to the Covenant of the League of Nations." In other words, what the Senate's fifth reservation demands is "not a vote on particular advisory opinions, but a veto on the unlimited use of a Court of Justice as a director of international policy or as a legal advisor" for the League. The reasons and purposes of the United States in demanding this right are ably expounded by Dr. Hill, and his conclusion is that this demand must be insisted upon by the United States as a condition of its adherence to this Court.

In the concluding chapter, which Dr. Hill entitles "Epilogue" in preference to "Epitaph," he sums up the controversy and its present status, and, after contrasting the attitude of the adherents of the Court with the assumptions underlying the Senate Resolution, he reaches the conclusion that the present *impasse* is one of misunderstanding as to what the functions of a real World Court should be, and that this misunderstanding should be dealt with at a third Hague conference, in which not merely the members of the League of Nations but all the members in good standing of the family of nations

would participate. This is exactly the purpose which was aimed at and provided for in the so-called Lodge plan.

CHANDLER P. ANDERSON.

L'Islam Sous le Joug. By Eugene Jung. Published in Paris by the author. 1926. pp. 95. Fr. 5.

The author of this small volume has lived in the French colonial possessions in the extreme Orient and in the Mediterranean areas. He has also written five books on the varying aspects of Oriental life and culture, to which number he has now added the above mentioned book. It is apparent that he is more concerned with the Near East than with those areas which lie between it and the extreme Orient of Japan and the Pacific Coast line Asiatic states. Throughout his small book the author asserts in no unmistakable language his view that the religion of Islam is still a factor to be considered by Western states and their leaders, for two reasons—one of which is that the promises by the Allied Powers of the West prior to the Treaty of Versailles have not been kept since the signing of that treaty. This statement is not quite in accordance with facts. But Mr. Jung deduces therefrom his second reason, that from this asserted failure arises the argument that a community of interests will ultimately compel Turkey, Libya, Mesopotamia, Syria, Palestine, and Transjordania so to arrange their policies that these states may become a Near East "Alsace Lorraine" (*vide* page 16). Throughout Chapter V the author is at pains to indicate that in Mongolia, China, Afghanistan, Persia and Turkey the penetration of Soviet ideals of government and culture are steadily being pursued by agents of the Russian Republic, to which must be added (according to the author) the equally steady delivery of arms and ammunition to the Mongolian and Afghan governments, of which he gives estimates (pp. 24 and 25). The book is marked by a lack of references for the quotations given, and by the undue prominence given to press reports of Russian and French newspapers; also the volume is without synopsis of its contents and is devoid of an index. Though interesting to read, the little volume seems impregnated with the atmosphere of political alarm and perhaps a sense of opposition to the faith of the Mussulman.

W. B. CARPENTER.

La Nationalité des Personnes dans l'Empire Britannique. By Robert Kiefe. Paris: Librairie Arthur Rousseau, 1926. (No. IV, *Collection d'Etudes théoriques et pratiques de Droit Etranger, de Droit Comparé et de Droit International.*) pp. viii, 191.

A mass of new nationality legislation having been enacted in a score of states since the World War, Dr. Kiefe's monograph upon the subject comes to clarify the British phase of it. It is one of the studies under the direction of M. Henry Levy-Ullmann, Professor of Law of the University of Paris.

Monographs setting forth the whole nationality legislation of each country will, the author believes, help pave the way for necessary international conferences, and lead towards Professor Levy-Ullmann's ideal of a unified world law.

The growth and evolution of British nationality are treated historically and legally in logical order under three main headings, "Nationality of Origin," "Change of Nationality," and "Nationality in the British Possessions beyond the Seas." In part one is included the British common law theory of allegiance, with the exceptions to the rule; the doctrine of inalienable allegiance and the grave difficulties encountered in attempting to enforce it; nationality of origin according to acts of Parliament; the development of the doctrine of *jus sanguinis;* and the present state of legislation under the reforms prescribed by the Acts of 1914 and 1922. Part two contains an analysis of the means of acquiring and losing British nationality, by denization, naturalization, option, voluntary expatriation, revocation, marriage, and the annexation or cession of territory. The author attributes to our Cable Act of 1922 the rise of the movement in England in favor of the separation of marriage and nationality. References are made to the deliberations upon this subtopic by the International Law Association in 1922 and 1923, and to the valuable report of the British Select Committee on the Nationality of Married Women (1923). A draft of the model convention drawn up by the International Woman Suffrage Alliance is presented. The nature and powers of government in relation to naturalization in the Dominions, Crown Colonies and dependent states are described in part three. The writer concedes the necessity for personal contacts in the Dominions to justify an opinion upon the real status of their subjects. Complete conclusions cannot be reached "par un tour de bibliothèque."

In the classified Bibliography, authors' surnames only are given. A few errors have crept into the study. Had Doctor Kiefe provided an index, and an appendix containing the texts of the British legislation discussed, the monograph would possess added value. This excellent work will be welcomed in a field in which there was a paucity of recent material, and should aid in accomplishing the general object for which it was prepared, the elimination of conflicts of nationality laws.

HENRY B. HAZARD.

Les Effets de Commerce en Droit International. By Arthur K. Kuhn. Paris: Librairie Hachette, 1926. (Studies of the Académie de Droit International.) pp. 76.

The movement toward international uniformity is the angle from which Mr. Kuhn approaches the subject of bills and notes and checks in international law. In this pamphlet he has told the story of the Hague Conferences of 1910 and 1912, and the draft uniform regulations to which delegates from 30 countries agreed. He has referred to projects for unification of

commercial laws, and the obstacles offered by the fact that each country has certain special usages to which it holds fast, partly for reasons of convenience and partly for reasons of national pride, usages which it is loath to sacrifice to foreign ideas. While such projects of uniformity of commercial laws generally have been abandoned, the project of uniformity on negotiable instruments has made steady, if moderate, progress; and this, because of business urgency and apparent practicability.

For bills of exchange and promissory notes, on the one hand, and for checks, on the other, the author has analyzed briefly the problems involved in existing conflicts of laws. With this background, he takes up the proposed international regulations embodied in the Hague convention, first showing the limitations to uniformity and the reservations made, then summarizing the positive provisions agreed upon with reference to capacity of the parties, protest, recourse, etc. He shows the effect of the World War in delaying these negotiations for international uniformity, and sketches the post-war interest in the subject as represented by the Brussels financial conference, the repeated pronouncements of the International Chamber of Commerce, and the specific activities of the League of Nations.

Uniform international regulations for bills of exchange, for promissory notes, and (separately) for checks, will undoubtedly be the subject of another international conference. In the Fourth Congress of the International Chamber of Commerce, at Stockholm, in June, 1927, there was an insistent recommendation of such a conference. A committee of the Chamber has submitted a revised draft of international regulations as a basis for action, this draft in the main following the Hague proposals of 1912, but incorporating a number of specific amendments.

Mr. Kuhn's study will help and interest any one concerned with this subject, and will make clear the relations which the project has to our own negotiable instrument laws and the corresponding laws of other important commercial countries.

CHAUNCEY D. SNOW.

Die Völkerrechtliche Option. By Dr. Josef L. Kunz. Erster Band, System der Option. Die Option im Deutschen Friedensvertrag. Breslau: Ferdinand Hist, 1925. pp. xvi, 328.

The increasing importance and complexity of nationality questions, together with the recent reversion to the plebiscite as a solvent for international issues, contribute much to the timeliness of this study. The author states that the work, which will include an additional volume, was prompted by a desire to examine the complicated nationality and option provisions of the Paris Peace Treaties, and that a prerequisite to such a study was necessarily a critical examination of the origin, development and significance of the option clause as an accepted principle of treaty practice involving state succession. The present volume is divided into two parts. The

first part deals with the historical evolution of the option system. It embraces a discussion of nationality in international intercourse, state succession and nationality, and the two types of option clause.

A valuable feature of this volume is the Appendix containing a collection of the texts of option clauses appearing in treaties covering the period 1667–1918. This chronological series of option clauses from various treaties tends to support the author's basic distinction as to the older and newer types of option clauses. This distinction rests on the evolution of the concept of nationality which began to supplant the principle of domicile and to assume definite shape in option clauses about 1815. The older type of option provision based on domicile emphasized merely the individual right of freedom of emigration in ceded territory. The modern type of option clause speaks in terms of nationality in matters of state succession. It is pointed out that the growth of the concept of nationality causing the transition from one form of option clause to the other was coincident with the industrial and commercial expansion of the early nineteenth century which moulded the modern state and quickened its interest in its nationals. With these social and economic changes making for a greater flow of population over national boundaries, the state was forced to give increasing consideration to the principle of nationality as against the principle of domicile, resulting in all the difficulties of nationality status which confront the modern Foreign Office.

The second part of this volume includes a detailed analysis of the option and plebiscitary clauses as applied to the territorial adjustments under the Treaty of Versailles, in the light of the general principles set forth in Part I. The author cites numerous instances in which the treaty departed from established practice, and he ventures the opinion that the same necessity which forced a prompt revision of the fiscal provisions of the treaty will eventually require certain territorial changes. Special consideration is given to the treaty provisions concerning Alsace Lorraine and Schleswig.

The notes are full and replete with citations to authorities and treaties. The tabulation of sources and the bibliography covering this and cognate subjects are carefully prepared and classified. The volume in prospect, covering the option provisions of the Hungarian, Bulgarian and Turkish Treaties, handled in the same scholarly manner as the present volume, will complete an authoritative study in this special field.

HOWARD S. LEROY.

A History of American Foreign Policy. By John Holliday Latané. New York: Doubleday, Page & Co., 1927. pp. xiv, 725. $4.00.

This is a very welcome addition to the growing list of books in the field of American diplomatic history and foreign policy. Professor Latané is already well known for his earlier books in this field, including *America as a World Power*, *The United States and Latin America*, and *From Isolation to Leadership*.

The work under review is in reality an enlargement of the last-named book, frequently utilizing its exact language, but so much additional material has been included in the present volume as to make it a substantially new and much more ambitious work. It is divided into six parts and thirty chapters. The titles of the parts, which give an idea of the scope of the work, are as follows: "Republican Principles and Ideals," "The Defiance of the Old World," "Rounding out Borders and Looking over Seas," "Safeguarding the Union," "Expansion in Caribbean and Pacific," and "Intervention in Europe."

As will be seen from this outline, the arrangement of the material is mainly chronological; but not strictly so, and the principal topics stand out in adequate perspective. The book is well balanced in respect to the amount of space allotted to the different periods. As one would be led to expect from Professor Latané's earlier books, the present work is written in a charmingly readable style. It should be noted, however, that the book is sometimes lengthened by the inclusion of details which add to the picturesqueness of the narrative, but are of little or no significance as far as American foreign policy is concerned. On some matters, Professor Latané shows the traditional view not to be well founded. Thus, he defends the Clayton-Bulwer Treaty, declaring that "Mr. Clayton cannot . . . be justly charged with a violation of the Monroe Doctrine, for the effect of the treaty was to leave England weaker territorially on this continent than she was before" (p. 318).

The book is based to a large extent upon original sources, but the author has also utilized a host of special monographs in this field. There is no preface, but a useful introductory note on the principal sources of information. Some criticism may be made as to matters of inclusion and exclusion. Thus, although a chapter is devoted to the Panama Canal, no mention is made of the controversy with Great Britain over the exemption from the payment of tolls by American vessels engaged in the coastwise trade. Such legitimate criticisms as may be made, however, are comparatively unimportant, and, on the whole, most readers will agree that this is probably the best single-volume general history of American foreign policy that has yet appeared.

JOHN M. MATHEWS.

Das russische Zwischenprivatrecht. By A. N. Makarov. Berlin: Hermann Sack, 1926. pp. 100. Index.

This brilliant essay, published under the auspices of the *Zeitschrift für osteuropäisches Recht*, is designed to present for non-Russian readers the salient features of international civil law as it is applied in present-day Russia. Its author, a professor of international law at Leningrad, is one of the two principal writers on the subject within the Soviet Union. His large work on *Principles of International Civil Law* (1924) and I. S. Peretersky's *Outline of International Civil Law in RSFSR* (1925), are the

only serious contributions on the subject in Russia since the war. In the first part of his essay, Professor Makarov deals with general definitions, explaining what, under the Soviet law, constitutes the various capacities of physical and juridical persons, and contrasting it with similar definitions laid down by the general European and the old Russian law. In the second part he examines the present-day Soviet legislation with regard to goods and debts, marriage, family, guardianship, and inheritance, again contrasting it, in each case, with the old Russian legislation on the same subject. In an appendix he outlines the principles of international civil proceedings, including the execution of a foreign verdict. The essay contains a brief bibliography. Professor Makarov's essay is rather stiff reading for an amateur, but it ought to prove of considerable value to the specialist, particularly if he is interested in the legal forms developed by the Soviet régime in Russia.

LEO PASVOLSKY.

Folkeretten i Fredstid og Krigstid. By Axel Möller. Copenhagen: G. E. C. Gads Forlag, 1925. Förste Del. pp. x, 332. Index.

The above volume is on international law in time of peace. It is evidently intended as a guide for beginners, but it is of such a character as might be expected of a thorough master of his subject who has tested the principles by experience. Dr. Möller's thesis for the doctorate was on "Responsibility for Damages in Cases of Collision at Sea." It won for him immediately a position as docent at the University of Copenhagen in 1914. Two years later he became a professor of law and he has occupied that position ever since. In addition, he has occasionally served as a member of the Danish Parliament and as consulting attorney for various shipping interests. Professor Möller relies largely upon German, French, British, American, Italian and Swedish authorities to substantiate the conclusions he has reached. In the bibliography he lists Professor James W. Garner as an Englishman.

Private international law is rather wholly excluded. He emphasizes overmuch that international law contains rights and duties for states alone. The reason may be that in Denmark international law is not, by the constitution, made a part of the law of the land as it is in the United States, Great Britain, Brazil, and Germany, and as is the trend of decisions in France and the Netherlands. Had not Professor Möller limited his treatise to the period since the Peace of Westphalia he would, no doubt, have given the contributions of the Baltic region to international law, notably in connection with the dominance of Wisby and later of the Hanseatic League.

The field is conveniently divided into four large chapters with numerous subheadings. The first chapter deals with the sources of international law and its growth since 1648. The treaties of peace at the close of the World War, the Washington Conference, the Geneva Protocol, and the Locarno Pacts receive their due share of attention. The second chapter discusses the

state and its component parts, territory, people, government and sovereignty. The third chapter is limited to the representatives of states, such as the head of a state, ambassadors, consuls, political agents, military officers, and members of international conferences, bureaus and courts. The fourth chapter comprises the legal aspects of international relations, such as the right of trade, the freedom of the sea, various kinds of treaties, violations of international law, sanctions, and the principles underlying the succession of states. The treatment differs from British and American texts in that no reference is made to decisions of courts or of international tribunals.

CHARLES E. HILL.

Jahrbuch des Völkerrechts. By Th. Niemeyer and K. Strupp. IX. Band (Sonderband). Kiel: Institut für Internationales Recht, 1926. pp. xii, 543.

In 1922, Volume VIII of this valuable series of original documents appeared. That volume contains the texts of the peace treaties from 1918 to 1921. The present special volume (IX) is a continuation of the preceding volume and includes the texts of the Treaty of Lausanne, the German-Russian treaties of the years 1920, 1921, 1922, and 1926; also the Russian treaties with England, with the border states, with Georgia, Armenia, Afghanistan; treaties of the border states with one another, and a series of separate treaties (Kars, 1921, Angora, 1921, 1925, the minority treaties and the treaty between Germany and Bolivia in 1921). These treaties have a direct relation to the treaties contained in Volume VIII and should therefore be read with that understanding.

But to a proper understanding of the new world order it is necessary to have at hand those documents, which supplement and serve to carry out the idea of the League of Nations, and the compiler has therefore included a series of European treaties and agreements, beginning with the Swiss-German treaty of December 3, 1921, and ending with August 7, 1926, relating to disputes, compromises and questions of security—forty-five documents in all.

There is also included a series of treaties of alliances, security and mutual guarantees, which form the documentary basis of the new European group of states known as the "Little Entente." And finally, the last 43 pages are devoted to the nine protocols, treaties and agreements of Locarno (from October 16 to December 1, 1925) which, through the admission of Germany to the League of Nations, round out an important period in European relations and fittingly conclude the present volume.

Since this work is made up entirely of original documents and contains no comments, other than a brief "Foreword" and occasional foot-notes indicating the sources from which the material is taken, the reviewer merely needs to add, in this connection, that the European custom of omitting the index is also followed in this book, but this deficiency is partly supplied by an orderly arrangement of the material and an analytical table of contents that is very

complete. From what has been said above, it follows that this and the preceding volume should be taken together, and, as such, they constitute a very complete documentary background of European international relations from 1918 to 1926. The documents are generally given in the language of the original draft, except where the original is Slavic or in one of the languages not commonly read by west-European scholars. But in every case the source and translation is indicated in a note.

KARL F. GEISER.

China and the Powers. By Henry Kittredge Norton. New York: The John Day Co., 1927. pp. xi, 264. Maps. Index. $4.00.

Among a number of recent books on China this is one that deserves careful reading. Mr. Norton spent several years travelling in Japan, China and Siberia, and has been a careful observer. He presents a picture far from optimistic of the Republic of China, torn by internal dissension and hostile to the great Powers of the world. In the opinion of the reviewer, he takes too gloomy a view of the situation, but it is just such a view as is taken by most Western travellers with Western conceptions of political institutions and Western love of efficiency. Mr. Norton evidently aims to be fair to all factions in China and fair to the Powers no less than to China. The book will not be found especially pleasing by the young Chinese who are so largely responsible for the unhappy condition of their country, yet he gives them full credit for their patriotic desire to save China from the morass in which it is struggling.

In his discussion of the "Undermining of the Social Structure," the author follows many other writers in assailing what he calls the "reckless procreation of the Chinese." There seems much misunderstanding of the facts relating to this matter. There is no such rapid increase of the population as is supposed. This has been shown by Rockhill and others. Even in the palmiest days of the Manchus, the census officers estimated the average family as containing five members. This would allow but three children to a family, and, when one considers the loss of population due to illness in childhood and to flood, famine and pestilence, it will be seen that the population is probably nearly stationary.

As to "Foreign Rights and Chinese Protests," Mr. Norton reminds us very properly that the foreign settlements at the open ports were as much desired by the Chinese as by the Europeans. The Chinese in fact were but segregating undesirable aliens much as we are endeavoring to do in some of our cities. As regards the extraterritorial jurisdiction exercised by the Powers, however, the author is at fault in intimating that the Chinese were glad to surrender jurisdiction. The contrary was shown in numerous instances. One of the principal causes of the first war with Great Britain was the attempt of the latter to assume jurisdiction over her subjects in China. The Chinese indeed attained the conception of sovereignty as territorial

many centuries before the Europeans did. The existence of Arab headmen in the ninth century, A. D., who administered punishment to offending members of the foreign colony at Canton is sometimes mentioned as indicating an exercise of extraterritoriality, but the appointment of these headmen was made by China and the law administered was Chinese. It was a measure adopted for the convenience of the Chinese authorities, like similar arrangements employed by the Spaniards in the Philippines for the control of Chinese. Referring to the Chinese Maritime Customs Service, officered by Europeans, Mr. Norton is mistaken in saying: "What seemed an excellent idea flashed across the mandarin mind. Why not let the foreigners continue to collect the customs duties and thus permanently increase the revenues accruing to Peking?" The mandarin mind endeavored by various plans to prevent the establishment of a foreign collectorate at Shanghai in 1853, and submitted in 1860 to an extension of the service to all ports only because they were defeated in war and were compelled by the treaty of peace to agree to such extension.

In the matter of the tariff, a slight error is made in the statement that the treaties of 1902 and 1903 provided for a fifty per cent increase in the duties, bringing them up to seven and one-half per cent *ad valorem*. This was true only of the export tariff. On the import tariff the duties were to be brought to twelve and one-half per cent. The author recognizes the justice of China's demand for tariff autonomy, saying, "Their argument in behalf of freedom to fix their own tariff schedule is almost, if not quite, unassailable." Great Britain is presented as the champion of the Occident and Japan as that of the Orient. Russia and Japan are represented as "still struggling behind the screen of the Chinese civil war." The Soviet policy is recognized as identical with that of Tzarist Russia and the influence of Russia in the present crisis is noted. Mr. Norton seems to the reviewer to be entirely right in holding that the main cause of China's ills is not foreign domination, but the industrial revolution.

E. T. WILLIAMS.

Statesmanship or War. By John McAuley Palmer, Brig.-Gen. U. S. A., (retired). Introduction by James W. Wadsworth, Jr., Chairman of the Senate Committee on Military Affairs, 1920–1927. New York: Doubleday, Page & Co., 1927. pp. x, 232. $2.50 net.

In his book on *Statesmanship or War* General Palmer has contributed a thoughtful study on what he holds to be the most suitable form of military preparation for adoption by the United States. His general line of argument is in favor of the military system adopted by Switzerland, modified as may be by an exhaustive study which he proposes shall be made by a competent commission of professional officers, citizen officers of the National Guard and Organized Reserves, as well as civilian publicists and educators. He maintains that the adoption of this system, extended in principle to preparation

for aerial and marine warfare, will put the United States in the "respectably defensive posture" advocated by Washington, will guarantee to the country an impregnable defense from which "we can, if necessary, develop an irresistible power of counter-attack." All of this will be accomplished without the nation assuming an attitude in the slightest degree provocative of war and with the minimum cost for its maintenance.

There is food for thought (and much discussion) in the author's declaration that the National Defense Act of 1920, "our existing military law," gives the President ample discretion to establish the proposed modified Swiss organization by executive order; and that there are strong reasons for believing that in passing the Act of 1920, Congress intended that such a system should be established and that it gave the President "unprecedented discretionary powers in the expectation that he would exercise them in accomplishing this object." Assuming the correctness of this view, the mere fact that these discretionary powers were so unprecedented, and that the full exercise of them would throw upon him the sole responsibility for so radical a step, easily explains presidential inaction from a natural desire to await more mandatory rather than act on purely discretionary powers.

The author points out that under the Swiss system that country had been able to mobilize for the defense of its neutrality in August of 1914, and within four days after the call, "a modern army completely organized and equipped and fully trained for its defensive mission," and which had cost less than twenty-seven dollars per year per soldier. The equipment of a modern army, not merely its initial equipment but that which it requires for operations in actual war for even a short time, is enormously expensive. It would be interesting, in fact, necessary in order to arrive at a conclusion, to have the details of the Swiss equipment that was available in 1914, and which was accumulated at an annual cost of less than twenty-seven dollars per man, even assuming that such items as clothing, food, medical attendance, etc., cost the government nothing. The Allies certainly had no belief in the unaided ability of Switzerland to defend her neutrality against any serious attempt. The danger of such an attempt was far less after two years of the war than it was in August of 1914. Yet even at that late date General Foch was charged with the study of the best plan to meet an invasion of the Central Powers through Switzerland.

General Palmer assumes that the defense of the United States will be assured if, under this system, we can mobilize 500,000 effective citizen soldiers, one man to every 230 persons, instead of one to every 13 as in Switzerland. The latter are raised by universal obligation to service, the former he assumes to be volunteers. His main idea is to abolish or reduce to a minimum the professional class and to substitute for it a "people's army." Yet it is not easy to see that he substitutes for the professional volunteer anything else than another class of volunteers from the same mass of people, less intensively trained but undoubtedly much cheaper to main-

tain. Nevertheless, as it is impracticable and undesirable to maintain a permanent force sufficient to meet the first brunt of a considerable war, some such system as this must probably be our reliance. But it commits the ultimate defense of the country not to the people but to a class of the people. And it is to be noted that this system is one primarily for defense. Many thoughtful observers of the trend of the times think that, so long as war must be the arbiter of our rights, we are more likely to have to fight for them abroad than to defend them against attack at home.

General Palmer's ideas are clearly conceived and set forth and should be carefully studied. The object that he has in mind is all-important and most desirable of attainment. His book is timely. With every failure of effort at Geneva or elsewhere to solidify world peace, we have to think the more of the defense of our rights whether at home or abroad. General Palmer thinks that an adaptation of the Swiss system to our needs will depend upon an exhaustive study of it by a commission of military and civilian experts. It is to be hoped that the government will be able to create such a commission whose study may result in an adaptation that takes into account the radically different environments of the two countries. To whatever extent it may enable statesmen to honorably avert war it will commend itself to all of us.

TASKER H. BLISS.

Consular Privileges and Immunities. By Irvin Stewart. New York: Columbia University Press, 1926. pp. 216. Bibliography. Index. $4.00

This work treats of the position under international and municipal law of the foreign consul who is a national of the appointing state and is not engaged in business in the receiving state. It is divided into six chapters which deal respectively with the public character of consuls, the inviolability of consular archives, the position of the consulate, including the right to display the national insignia and the question of asylum, the extent to which the consul is exempt from taxation, his relation to the local courts of the country in which he is stationed, and a final chapter devoted to miscellaneous privileges and immunities, including exemption from military billeting and service, right of communication with the receiving government, and the position of the consul in time of war.

A unique and important feature of the work is the quotation from the municipal laws and regulations of various countries of passages relating to consular privileges and immunities. The chapter on exemption from taxation contains a summary and classification of forty-one treaties which the United States has entered into with foreign countries covering the subject.

The difference in the method of treatment between the present work and that in *The Foreign Consul: His Juridical Status in the United States*, by Julius I. Puente, which was reviewed in the January number of the JOURNAL by the writer, may be seen by contrasting Chapter V on the Consul's Relation to

Local Courts with the chapters in Puente's work. In the book under review, the author quotes the writings of various Secretaries of State of the United States as authority for his statements, and also a summary of treaty provisions between the United States and foreign countries regarding the attendance of consuls as witnesses, their liability to suit, and to arrest and punishment. The work of Puente, however, deals with the status of a foreign consul in the United States and bases its statements upon reported decisions of State and Federal Courts of the United States.

The present work does not deal with the exceptional privileges and immunities enjoyed by consuls in extra-territorial countries. It is an important addition to the growing body of literature on the consular position, and constitutes the first comparative study of the laws of various countries with respect to the topics treated.

CRAWFORD MORRISON BISHOP.

Die völkerrechtliche Haftung des Staates, insbesondere bei Handlungen Privater. By Karl Strupp. Kiel, 1927. pp. 36.

This monograph is the first of a series to be published under the auspices of the *Institut für internationales Recht* at Kiel, now under the direction of Prof. Schücking, dealing with the subjects which the Committee of Experts of the League of Nations have undertaken to codify. The pamphlet under review deals with the responsibility of states, especially in case of acts of private individuals. The author, Dr. Strupp, who in 1920 published his *Das völkerrechtliche Delikt*, examines the theory of state responsibility and presents a draft treaty or code to which states might subscribe. It differs in several respects from the Guerrero draft [1] which the Experts' Committee of the League has made the basis of its proposal.[2]

Briefly, Dr. Strupp's draft proposes to make the state responsible for all positive acts of any of its officials, major or minor, which violate the state's international duties toward other states. For the acts of private individuals, the state is not to be responsible unless it has been guilty of negligent omission or failure, after opportunity, to prevent the injurious act, or to punish the offenders. Thus, for officials, the state becomes liable without fault of its own; for private individuals only on proof of "state fault." Some might say that in either case only some officer or official agency could be deemed guilty of "fault," the state's vicarious responsibility being that of a guarantor or that of a principal for the acts of his agents. Mere violation of official duty, if within the general scope of the officer's powers, is not to be deemed an *ultra vires* or "personal" act. For riots or disorders or civil war proved state culpability must be the basis of responsibility. Negligence is to be measured by the degree of care required by the circumstances (Janina-Corfu cases). Failure to enact legislation necessary to comply with inter-

[1] See editorial in this JOURNAL, Vol. 20, p. 738.

[2] League publications, C. 196, M. 70. 1927. V., p. 90.

national duties is a ground of responsibility. Federal states are responsible for constituent states. Responsibility for courts must be based upon intentional delays or denials of justice, not merely erroneous decisions. A state's measures of redress must be proportioned to the delinquency. A state can interpose only on behalf of its injured national. Every claim not settled by diplomacy must be submitted to the Permanent Court of International Justice. Acts of necessity or reprisals are expressly omitted from the proposed convention, which is to come into force as soon as five states have ratified it.

The theory that the state is responsible for all wrongful acts of officials injurious to aliens is based on Gierke's "organ" theory that whenever an officer acts the state acts. The state's responsibility is thus not vicarious, but "its own"; yet strangely, not because of "its" culpability, but automatically and objectively for "risk." No matter how inferior the official, the state becomes immediately responsible, without possibility of exculpation. International courts have not followed this theory, in the case of many minor officials, and have awarded damages as a rule only where the state has failed adequately to punish the offender or afford the injured person opportunity for redress. The proposal of Dr. Strupp conforms more closely to the practice pursued in France and Germany than in most other countries. The proposed rule is to be approved, perhaps not on the "organ" theory, but on the ground that civilized practice has found social utility in making the employer responsible for the acts of employees acting within the scope of their employment. There is no sound reason for excluding the state as an employer. In this respect, it is likely that the United States and England will soon adopt this civilized rule in their governmental business, as several other countries do, and may then be willing to subscribe to a similar international rule.

Dr. Strupp dodges some of the difficulties of *ultra vires*, but suggests a broad rule of responsibility. The French practice of *faute de service* might well be adopted internationally. Dr. Strupp is to be supported in his view that in the case of acts of individuals, the state is responsible only for its "own" delinquency in negligently failing to prevent or punish. So in the case of riots or injuries incidental to civil war. Nor should there be set up a separate category of "political" crimes, as the Council of Ambassadors in the Corfu case suggested. The necessary degree of care might be greater in the case of foreign public officials received in the national territory. But why should a resolution introduced by a member of Congress (p. 19) and offensive to a foreign nation or official be deemed an international delinquency? The fact that two distinct governments, constituted and the revolutionary, in case of civil war, may impose responsibility on the nation is an anomaly, but one of the costs of successful revolution. The draft, probably intentionally, leaves many difficulties unsettled. What is an "international duty"

or "delinquency" or "denial of justice"? Practice and precedent help, but some practice must be viewed as an illustration of what the law is not. That pecuniary claims must be submitted to judicial determination, and never become the occasion or ground for forceful measures ought to be universally admitted. Dr. Strupp's proposals, while important, are not as original as he occasionally seems to assume.

EDWIN M. BORCHARD.

Carriage of Goods by Sea Act, 1924. Including the Rules Relating to Bills of Lading (The Hague Rules), with notes, etc. By Robert Temperley, M.A. 3d ed., revised and enlarged, and with appendices containing information as to the dominion and colonial statutes embodying the rules, and the American Harter Act. By the Author and John Rowlatt, B.A. London: Stevens & Sons, Ltd., 1927. pp. xv, 128. Index. 7s. 6d. net.

This third edition is "a complete legal text-book, discussing fully, and primarily from the point of view of the lawyer, all the problems of any importance which appear to arise in connection with the Hague Rules and the various enactments of Great Britain and the British Dominions and Colonies which have been passed to give them legal effect." The introduction traces the history of legislation which was brought about by the fact that "the liner companies, limited in number and thus capable of effective organization, were for all practical purposes in the position of monopolists, and therefore able to dictate the terms of their bills of lading." This legislation, beginning with the Harter Act in the United States in 1893, which was followed by certain British Dominions, led to the adoption by the International Law Association of the rules known as The Hague Rules, in 1921 and 1922, and to the holding of the Diplomatic International Conference on Maritime Law in Brussels in 1922. The draft convention recommended by that conference, which in effect embodied the Hague Rules, has been substantially enacted by Great Britain and Ireland and certain other portions of the British Empire, but in no other country has statutory effect been given to the rules.

The book is well written, as one would expect from the qualifications of the authors. They point out the difficulties and obscurities of the Act, and discuss them in sound English legal style, with reference to the decided cases, American as well as British, which have a bearing, direct or indirect, upon the rules in question. The existence of such difficulties and obscurities even in legislation so carefully prepared by experts, is a commentary upon the optimism of those who believe that all the uncertainties of the common law can be readily removed by any well-meaning legislature. For practitioners dealing with this subject, the book would appear to be indispensable.

EDWARD A. HARRIMAN.

Die Verfassung der Völkerrechtsgemeinschaft. By Dr. Alfred Verdross. Vienna and Berlin: Julius Springer, 1926. pp. x, 230. Index. RM. 15.

Professor Verdross, of the University of Vienna, gives us in this very careful study an illuminating discussion of the fundamental principles upon which are based the idea of a community or society of nations and the rules which regulate their mutual intercourse. His exposition of legal, political and (at times) metaphysical fundamentals is illustrated throughout by concrete examples taken from the history of international judicature. The transitional character of everything relating to international law and government in our time is shown, among other things, by the terminology applied to them in the various languages. Professor Verdross contributes to the linguistic efforts of his German colleagues by using and defining terms which, by virtue of their persistently composite structure (running sometimes to the length of thirty-one letters), certainly come very close to hitting the mark. For example, his Preface is devoted mainly to defining the two chief words in the title. Among the three possible uses of *Verfassung*, he selects that which includes "those norms that have produced the structure, organization and functioning of a community"; while *Völkerrechtsgemeinschaft* is used to connote "the specific community that is founded on the general law of nations." The prevalent tendency to derive this community of nations from common cultural and economic interests is rejected by our author, who argues convincingly that it lives and moves and has its being because of its legal or norm-al basis. He argues valiantly, also, for the unity, as against the plurality, of the international community's legal system. This unity, he admits, is not dependent upon a central authority (*autoritative Zentralinstanz*), such as the League of Nations; but it arises from a consistent body of international law. How this system of underlying international principles has dominated, or has been violated by, the public and private international law of our time, by the League of Nations and its various activities, and by protectorates, confederations, nation-states, condominiums and the mandate system, is made abundantly clear to the well-informed reader by the author's lucid exposition of them.

The political scientist, as distinguished from the internationalist, will read with appreciation Professor Verdross' exposition of such concepts and realities as the *Staatenbund* and the *Bundesstaat* (pp. 100–111), the status of states before and during the international régime (pp. 115–151), the municipal and international character of rebel-states (pp. 154–156). But the author's absorbing interest in ideas and things international naturally gives a predominantly international coloring to his discussions of both municipal and international affairs. Among the latter, his treatment of the recognition and disappearance of states, the Papacy, individuals as subjects of international law, and the administration of the Saar and the Danube, are noteworthy.

Although the last word is still far from being written on the subject, this

monograph constitutes a noble effort to seek out and expound in the clarity of reason and experience those fundamental principles of a legal nature upon which rest the international law and government of our time. The reviewer would express his full sympathy, also, with the admiration and gratitude which led the author to dedicate his book to that great internationalist, Heinrich Lammasch.

WILLIAM I. HULL.

Les Origines de la Guerre. By Edmond Vermeil. Paris: Payot, 1926. pp. 254. Index. Fr. 20.

In this important volume Professor Vermeil, of the University of Strasbourg, presents, for the period 1900–1908, a condensation of the material contained in the momumental collection entitled *Die Grosse Politik der Europaischen Kabinette, 1871–1914.* For the many readers that have difficulty in translating the German language, the facile and readable translation of Professor Vermeil should prove a boon. Professor Vermeil does not attempt a history of European diplomacy covering the first decade of the twentieth century. His volume is a digest of the despatches and instructions in the German Foreign Office illustrative of German foreign policy during this critical period. The long and carefully selected excerpts from the pertinent documentary sources reveal the author's deep insight into that vortex of ever-changing forces we usually term diplomacy.

At the beginning of the twentieth century one of the chief concerns of Germany was the attitude of Italy towards an effective renewal of the Triple Alliance. Bülow feared that Italy was fast being drawn into the orbit of the Dual Alliance. In 1901, the relations between Italy and Germany were apparently becoming more and more strained. Monts, the German Ambassador at Rome, was filled with misgivings. Despite the influence of France, Italy was not yet ready for a definite break with Germany, and after many months of active negotiations, the fourth treaty of the Triple Alliance was signed on June 28, 1902.

If the attitude of Italy toward the Triple Alliance had awakened apprehensions in Bülow's mind, so had that of England. Would it not be eminently wise for Germany to bend every effort to attach England to the Triple Alliance? Bülow was strongly of this opinion, and he appeared to believe that such a task could best be executed by the Emperor himself. The specter of an entente between England and the Dual Alliance continued to haunt Bülow, and in 1903 the best preventive of such a contingency seemed to be a restoration of the old league of the Three Emperors. After the conclusion of the *entente* between France and England in 1904, Bülow professed to believe that it was in no way directed against the Triple Alliance. But Bernstorff writes from London that the English people were coming to the opinion that Germany only "awaits the first opportunity to attack England and take from her the supremacy of the seas." The real purpose behind the

German naval program was to "snatch the trident" from the enfeebled hand of old England. With the British public in this mood the *entente* with Russia was inevitable. The Anglo-Russian entente of 1907 was the beginning of a new era in European diplomacy. That its influence was to be chiefly felt in Europe was well appreciated by the German Foreign Office.

The roots of the World War may be clearly discerned in the groupings of the European Powers during the decade from 1900 to 1910, and for a clear and interesting presentation of these international developments the volume of Professor Vermeil will have permanent value.

CHARLES C. TANSILL.

Foreign Rights and Interests in China. By Westel W. Willoughby. Baltimore: The Johns Hopkins Press, 2d ed., 1927. 2 vols. pp. xxxvi, xvii, 1153. Index. $12.00.

In the seven years between its first and second editions, Professor Willoughby's invaluable treatise has grown from one large volume to two, from 594 pages to 1153. The expansion is due, not to the increase of "foreign rights and interests," but to the importance of negotiations within recent years between China and the Powers for the modification or abolition of agreements or understandings under which the rights have existed and the interests have been enabled to develop. The second edition comes at an opportune moment, when the unexpected success of the Kuomintang campaign has brought the issue of further negotiations for treaty revision sharply into the foreground of Sino-foreign relations.

The first volume deals principally with territorial interests, the second with extraterritoriality and financial, commercial and mission interests, concluding with a chapter on opium. So well-known and highly regarded is the first edition of this work that it would be gratuitous use of space to say, respecting the quality of the second edition, more than that it maintains the standards of the first for clean-cut statement, presentation of evidence and objectivity of treatment. The earlier text has been thoroughly revised and largely rewritten. Discriminating use is made of fresh material from articles and monographs. Particularly full are the excerpts from the deliberations of the Washington Conference. Seldom does the author attempt to conclude a controversial issue, the outstanding exception to this rule being his declaration (II, p. 1090) that though: "Attempt has been made by some writers to show that this war was not properly termed an 'Opium War,' . . . the evidence is overwhelming that it was with justice given that name." In the first edition occurs this sentence (p. 465): "Thus, aside from opium, there were intolerable elements in the situation which had to be corrected." The present edition contains no reference to these "intolerable elements."

In his first volume Professor Willoughby follows an interesting path from the beginning of foreign territorial rights, through the Open Door, spheres of interest, leased areas and residential concessions and settlements to a con-

cluding chapter on the "mixed courts." In a preliminary chapter on China's commitments, he expresses the opinion that the Chinese favor repayment of all loans while inclined against "continued recognition of the special rights and incidental obligations created by . . . loans or other agreements" (I, p. 8). In dealing with the League's interest in the Chinese situation he overlooks the Assembly resolution of 1925, an omission easily understood in view of the indefiniteness of the resolution.

Consideration of the most-favored-nation clause in China's treaties leads the author to point out the significance of efforts made by states negotiating with China for treaty revision to maintain the clause, efforts which China opposes on the ground that their success would hold tariff rates to the lowest mark provided for by any effective treaty (I, p. 42). Subsequently, discussing sovereignty, he maintains that China is a fully sovereign state under international law (I, p. 47). There is good evidence, the reviewer is informed that Secretary Hay used the term "entity" advisedly and not merely "as a matter of verbal nicety" (I, p. 53). Respecting the present status of the Open Door doctrine it is observed that apparently, "there is placed upon the Powers signatory or adherent to the Washington treaty an obligation so to modify such agreements as they may have with China as to bring them into consonance with the Open Door doctrine as declared and defined in that treaty" (I, p. 124). Professor Willoughby anticipates an attempt to maintain the spheres of interest in effect, though the Powers disclaimed their rights in them at the conference (I, p. 130). The chapters on the various spheres of interest are especially full, accurate and useful, including lengthy and careful accounts of Japanese policy and activities in Manchuria and Shantung. After contrasting the American Monroe Doctrine with the so-called Japanese Monroe Doctrine for Asia, the author concludes that the former affords to Japan, "no warrant for interfering with the domestic affairs of China or Eastern Asia generally, or for objecting to the policies or actions of the Western Powers in the Far East except in so far as she finds her own national safety affected" (I, p. 416). Curiously enough he then goes on to say: "it [the United States] has exercised its powers of military intervention or of financial administration solely for the benefit of the peoples of the countries concerned or of those who have had just pecuniary claims against them" (I, p. 417). Of the obvious *petitio principii* in this latter statement the Japanese are fully cognizant.

Volume II brings down to date the author's excellent discussion of extraterritoriality. The reviewer would expect from a writer who states (II, p. 659) that, "China has [since 1903] made great advances in the matters of providing modern courts, trained lawyers and judges, and scientifically drafted codes of laws," a somewhat fuller exposition of these developments than is afforded by the few lines quoted from Dr. Wang Chung-hui (II, pp. 673–4). The author fails to inquire into the experience of Germans and Russians with Chinese courts since the loss of extraterritorial rights by their

governments, nor does he suggest anything toward a program of relinquishment beyond the plan which he put forward in 1920 and now regards as impracticable.

The treatment of foreign land-holding, of the rights of merchants and missionaries, of foreign patents and copyrights, and of inland navigation has been supplemented with recent materials. The subjects of debts, indemnity remissions, loans and the revised consortium receive adequate consideration. Of particular interest at this moment is the analysis of the customs administration and the account of the movement for tariff autonomy, which is carried through the Peking Conference of 1925–6. The final chapter, on opium, is a concise handling, in less than 40 pages, of the whole history of that question as an aspect of China's foreign relations.

HAROLD S. QUIGLEY.

Handbook of International Law. By George Grafton Wilson. 2d ed. St. Paul: West Publishing Co., 1927. pp. xxii, 567. Index.

The first edition of this book, which was published seventeen years ago, is so well known that little need be said by way of description as to the second edition. While some new sections have been added and the changes necessitated by developments since the appearance of the first edition have been made, the mode of treatment has not been substantially altered. The present edition is characterized by the same logical arrangement and clearness of statement which won so much favor for the book in its original form. A modification in the author's point of view which will be gratifying to all who conceive of international law as law is his greater reliance upon judicial decisions as sources of law. In Anglo-American jurisdictions it may be assumed that the recognition of the legal character of international law will depend chiefly upon the extent to which it obtains such recognition from the courts. It is to be regretted that in his treatment of judicial decisions the author gives so little of the *ratio decidendi* upon which they were based. Too often his statements do not go beyond the scope of a reporter's headnote. The usefulness of the book would be enhanced if a table of cases were included.

In his apportionment of space, the author follows the traditional practice. He gives as much attention to the abnormal relations of war and neutrality as to the normal relations of peace. He devotes thirteen pages to a discussion of the rules for the determination of nationality and the law of expatriation, although he recognizes that these subjects do not fall within the province of international law. The statement on page 133 that "the nationals of a foreign state cannot claim more privileges than the subjects of the state in which they are for the time" is too broad. Such claims may be justified by treaties between the states concerned. A familiar example of such a claim not based upon a treaty is found in the controversy between the United States and Russia concerning the application of Russian legislation to American Jews in

Russia. The United States claimed for American Jews a more favorable status in Russia than was accorded by the law to Russian Jews.

The author makes contradictory statements as to the nature of the union between Norway and Sweden which was dissolved in 1905. On page 16 he calls it a "personal union," on page 28 he describes it as a "real union," while on pages 20 and 207 are printed official documents in which its true character is set forth. The statement on page 29 that several of the Central American states are federal unions doubtless refers to the short-lived confederation of the Central American Republics. In the appendices are printed several important documents, including the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice.

LAWRENCE B. EVANS.

Zeitschrift für Ausländisches und Internationales Privatrecht. Edited by Ernst Rabel, with the collaboration of Ernst Heymann, Heinrich Titze: Martin Wolff, Max Pagenstecher and Franz Schlegelberger. Berlin, Walter de Gruyter & Co. Ann. 40 RM.

The *Institut für ausländisches und internationales Privatrecht* was organized in 1926 as a sister society to the *Institut für ausländisches öffentliches Recht und Völkerrecht.* Its labors cover the field of foreign civil and commercial law and private international law, together with treaties affecting private rights. The new periodical, of which the first two issues are before us, is designed to constitute the official organ of the *Institut.* It has also taken over the functions of *Auslandsrecht* (1920–1926), the *Blätter für vergleichende Rechtswissenschaft und Volkswirtschaftslehre* (1905–1926), as well as of that part of the *Rheinische Zeitschrift für Zivil- und Prozessrecht des In- und Auslandes* which has heretofore been devoted to private law. The periodical begins, therefore, with a considerable background of experience and, to judge from its first numbers, proposes to maintain a high standard of scholarship.

Professor Rabel, as editor-in-chief, appropriately contributes the first article, which deals with comparative law in its relation to international tribunals. The subject has become of great importance since the establishment of the Permanent Court of International Justice, which, both by structure and mode of functioning, gives respect to the various systems of jurisprudence. Professor Rabel discusses some of its recent decisions in which the court has been compelled to draw from the law or legal concepts of conflicting national systems in order to interpret international treaties. He agrees, for example, with the result reached in the Mavrommatis case (Judgment No. 2) in the court's solution of the conflict in the meaning of the words "*contrôle public*" under French law as applied to public utilities with that of "public control" under English practise. The court adopted the practise of both countries to some extent, not by way of mere compromise, but as essential in executing the intent of the parties. The mixed

arbitral tribunals have also had difficulty in applying terminology of varying significance employed in the Treaty of Versailles in the French and English texts respectively. Professor Pappenheim contributes an analysis of the new Swedish law relating to the estates of deceased persons. Dr. Flotow presents an outline of the present status of the movement toward international unification of the law of negotiable instruments. Professor Nipperdey reviews the 1926 draft for a law relating to collective-bargaining agreements in Holland. Dr. Rheinstein contributes a most exhaustive review of the legislation, jurisprudence and legal literature of Italy during the first half of 1926. Other articles consist of comments upon the reform of the corporation laws of various countries and a review of the movement for uniform State laws in the United States.

ARTHUR K. KUHN.

BOOK NOTES

Le Gouvernement Municipal aux Etats Unis. By Dr. Elizabeth Marshall. Paris: Marcel Giard, 1927. pp. 157.

This interesting little book treats of the history, structure and experience of American city government, especially in comparison with the typical French municipality. The authoress has been pursuing legal studies in France as well as at the Academy of International Law at the Hague. She presents no mere academic appreciation of the various systems, but deals with the advantages and faults of each, in practical operation. Foreign readers will welcome this impartial and graphic picture of local government in the United States, presented as a comparative study.

A. K. K.

Internationales Verwaltungsrecht. By Karl Neumeyer. Vol. III, Part I. München: J. Schweitzer Verlag, 1926. pp. v, 300.

By the present instalment, Prof. Neumeyer, the distinguished scholar at Munich, continues his monumental work on "International administrative law." He has taken for his province the examination of those international arrangements, whether effected by treaty, custom or statute, which relate to the active daily intercourse of states arising out of the interstate movement of persons and things. The work of administrative unions is only a small part of this field, largely neglected by the general student of international law in the probable assumption that the practical details could be found when wanted. Experience usually records disappointment. This need Prof. Neumeyer meets in the work under review, the present instalment of which deals with the administration and management of means and modes of transportation. More particularly, he discusses public highways, railroads, maritime transportation, including the ship, its crew, passengers and freight, the voyage and collateral aids to shipping, internal navigation, air

traffic and emigration. Every source of international law and municipal law is drawn upon to supply the wealth of material around and from which the work is constructed. The author's broad background and experience of comparative law enable him to present his material critically, and to raise those problems which the less informed might not observe. The work will doubtless take its place as the standard in the field.

E. M. B.

Documentary History of the Tacna-Arica Dispute. By William Jefferson Dennis.* University of Iowa Studies in the Social Sciences, Vol. 8, No. 3, Published by the University, Iowa. pp. 262. $2.00.

This little book contains an editorial introduction by Mr. Louis Pelzer, editor of the University of Iowa Studies in the Social Sciences, in which it is stated that:

> William Jefferson Dennis, the author of this study and an instructor in the State University of Iowa, was a resident of Peru from 1917 to 1922 and also visited Chile and Bolivia. These qualifications, it is hoped, have enabled him to preserve something of the atmosphere of the controversy without impairing the judicial and impartial spirit of its record.

There is also an introduction by the author of 29 pages dealing with the history of the Tacna-Arica dispute. This is followed by a collection of documents divided into three parts, *viz.*, Documents relating to causes of the War of the Pacific, Documents relating to peace proposals in the War of the Pacific, and Documents relating to consequences of the Treaty of Ancon. These documents are arranged in chronological order, dating from a colonial map of 1787 to General Lassiter's address before the Plebiscitary Commission, Tacna-Arica Arbitration, on June 14, 1926. Some of the documents (as is the case with this address) are represented only by relatively brief extracts. Probably no two students of the question would be in complete accord as to such a selection of documents. Much depends on the point of view; but the author's selection is made with care and discrimination. In many cases the author has prefixed notes which endeavor to supply the gaps in the story as told by the documents themselves, or to interpret or comment upon the documents. Whether or not the reader agrees with these notes and comments, he will find them pertinent and interesting.

The book is a useful and convenient introduction to the study of the literature of this important question.

*Not to be confused with William Cullen Dennis, Corresponding Secretary of the American Society of International Law, who was the General Legal Advisor of General Pershing President of the Plebiscitary Commission, and General Morrow, Chairman of the Special Commission on Boundaries, Tacna-Arica Arbitration.

REVIEW OF CURRENT PERIODICALS

By Charles G. Fenwick

California Law Review, July, 1927

The Effect of the League of Nations Covenant on the Theory and Practice of Neutrality, by Malbone W. Graham, Jr. (pp. 357–377), is a careful and scholarly, and at the same time illuminating, study of the extent to which the traditional "law of neutrality" has been modified by the new legal relationships created by membership in the League of Nations. The author finds that it is still possible for members of the League to be neutral in the three classes of what are designated as "tolerated wars," that is, wars which the articles of the Covenant do not expressly outlaw, in that the methods of peaceful settlement still leave certain loopholes after the preliminary procedure has proved unsuccessful. In the application of the sanctions of the Covenant the author finds that the coercive measures contemplated in Articles 11 and 16 are not to be regarded as producing formal war, with its concomitant neutrality, but as amounting to no more than "intervention," the legal effects of which it is difficult to determine. The outcome of the present process of strengthening the institutions of the League will, the author believes, tend to close the breaches in jurisdiction until the specific instances of war, and with it neutrality, gradually disappear.

Columbia Law Review, April, 1927

Post-War International Law, by John Bassett Moore (pp. 400–412), takes as its text the tenth edition of Lawrence's Handbook of Public International Law and proceeds, with humor and irony, to maintain the writer's well-known thesis, namely, that the international law of war and of neutrality, as it existed in 1914, was a positive legal code of binding obligation not to be minimized and waived aside as having lost its force by reason of the changed conditions of the World War. Exceedingly instructive is the writer's comparison of earlier and later editions of the Handbook, and his final comment that writers on international law "should not be less careful than writers on municipal law to keep within the range of legal ideas and legal terminology" will be listened to with the respect due to the words of a master.

Cornell Law Quarterly, December, 1926

The British Dominions and Foreign Relations, by Herbert A. Smith (pp. 1–12), points out that the business of international relations may be divided into two classes, the one consisting of routine business involving normal commercial and other contacts, the other consisting in the major issues affecting

the existence of the Empire as a whole. In respect to the former it has been possible to concede to the Dominions a substantial autonomy without violating the principle of imperial unity. In respect to the latter the writer believes that the admission of the Dominions to the council table cannot be made a matter of law, but must be left to the decision of the London cabinet. The maximum of liberty compatible with the continuance of the British Empire as a sovereign unit in the eyes of international law is the liberty the Dominions now possess of refusing active assistance to the Empire in time of war and of refraining from passing legislation necessary to carry out the obligations of a treaty. *International Law in Relation to Private Law Practice*, by Frederic R. Coudert (pp. 13–23), emphasizes before an audience of law students the legal character of "international law" as a part of the general system of law and the necessity of the making scientific study of international law an established part of the curriculum of the schools of jurisprudence in our leading universities. With respect to the "practice" of international law, the writer observes that "there are no watertight compartments, and international law and general private law are too closely related to permit a practitioner in any one sphere to ignore developments in another."

Harvard Law Review, November, 1926

Jurisdiction at the Maritime Frontier, by Edwin D. Dickinson (pp. 1–29), analyzes American cases, beginning with *Church v. Hubbard*, and points out the inadequacy of the traditional doctrine in the face of modern conditions. The peculiar nature of the maritime frontier "makes an arbitrary and mutually exclusive system of jurisdiction impossible of realization." The only solution of the present situation is to give "express extraterritorial effect to statutes," provision for which is contemplated in the draft convention (Art. 2) recently submitted by the Committee of Experts on the Progressive Codification of International Law appointed by the Council of the League of Nations.

Illinois Law Review, April, 1927

Domicile, Double Allegiance, and World Citizenship, by John H. Wigmore (pp. 761–770), after pointing out the "intolerable" conditions attending the present "deadlock on the subject of citizenship" advocates a change in the present rules of international law by which citizenship should be identified with domicile, *i.e.*, it should be "territorialized or localized," should be compulsory, and should be exclusive and single. Apart from the advantages of such a system in respect to the determination of allegiance, the writer believes it would be the solution of the present "inter-state meddling on behalf of citizens." "A man changes his citizenship with his domicile. When a man leaves one country and goes to another to settle, he voluntarily ex-

patriates himself. He joins another community and gets a living in it. There is no reason why his old community should fight for him." The analogy is offered of the relations between the several States of the United States.

MICHIGAN LAW REVIEW, April, 1927

New Avenues to Freedom, by Edwin D. Dickinson (pp. 622–644), is a "survey of some contemporary factors affecting the development of the law of nations." Elaborating ideas already expressed by him on various occasions, the writer calls attention to the "tyranny of phrases" to which international law has so long been subject. He singles out the phrase "the sovereignty of the state" for analysis and critical comment, asserting that it "has been an excuse for vanity, a subterfuge for selfish ambition, and a screen for ignorance in international relations. Rarely if ever has it expressed a legal principle or standard unmistakably relevant to the substance of the particular problem or controversy." As for "arbitrary rules which have outlived their reason," the writer comments at length upon the rule of the three-mile limit of marginal sea which was reaffirmed by the United States and Great Britain in their recent treaty. "It is no matter that the reason for the rule is dead nor that the rule itself may make it impossible to cope adequately under modern conditions with those who flout national laws. The rule must stand though the heavens fall." A similar indictment is brought against the doctrine of state immunity from suit in foreign courts. Again, there is the "tyranny of rights untempered by responsibilities" by which, for example, a nation has the right to protect ships flying its flag upon the high seas but no responsibility for their conduct; or again, the right to protect its nationals abroad but only a very uncertain duty to give corresponding protection to aliens within its borders. The writer then turns to the problem of organizing and improving the processes and principles by means of which international relations are conducted and surveys sympathetically the coöperation that is "actually being achieved through the League of Nations." The new "avenues to freedom" consist in the development of administrative institutions and services, in the development of peaceable processes for settling disputes, and in the development of new law through conference and treaty. "Relief from the tyrannies of law in a relatively unorganized society is being attained through the processes of organized coöperation."

UNIVERSITY OF PENNSYLVANIA LAW REVIEW, May, 1927

The Nationalization of Joint Stock Banking Corporations in Soviet Russia and its Bearing on their Legal Status Abroad, by Paul Wohl (pp. 622–645), continues and concludes the study begun in the March issue (being a translation of an article originally appearing in *Ostrecht* for November, 1925).

The writer passes to a consideration of the attitude of the United States courts towards the nationality decrees, the attitude of the British House of Lords, of the German Kammergericht, and of the French courts since the recognition of the Soviet Republic by France. The writer concludes his lengthy study by suggesting that the most satisfactory solution of the problem is to recognize the transition to the Soviet State of the foreign property of the former joint stock companies and to accept the necessary legal consequences.

Virginia Law Review, November, 1926

The United States and the World Court, by Edward A. Harriman (pp. 1–21), analyzes and defends the reservations and understandings which the Senate attached to its resolution of January 27, 1926, by which the advice and consent of the Senate was given to the World Court protocol. The sum total of the reservations is that "the United States is willing to coöperate with the League of Nations in maintaining the Permanent Court of International Justice, which is the judicial machinery of the League, for use when desired, and that is all." *Extraterritoriality and the Mixed Court in China*, by Robert T. Bryant, Jr. (pp. 27–36), maintains that to abolish the existing system (early 1926) without qualification would be disastrous to both foreigners and Chinese, for the reason that "China at the present time has practically no Government at all"; it "recognizes no Constitution"; it has not enacted any new laws "to amount to anything" in the last eighty years; many of its laws are unsuitable to apply to foreigners; Chinese procedure is incompatible with Anglo-Saxon ideas; and China has no class of men from which to draw its judges. In place of the Mixed Court in Shanghai the writer proposes a special reorganized tribunal which could in due time be handed over to the Chinese and the foreign judges eliminated.

Ibid., March, 1927. *The New International Status of the British Dominions*, by Frederick S. Dunn (pp. 354–379), surveys the anomalous position occupied by the Dominions in the decade preceding 1926 and then undertakes an examination of the still more anomalous situation resulting from the action taken by the Imperial Conference of 1926. "We may conclude," says the writer, "that the British Empire is no longer itself a state as that term is used in international law, but that it is a corporate association of sovereign states which have a common heritage and common institutions and have agreed under certain circumstances to act together as a unit in international affairs." The Empire still "remains in existence as an international entity," but this existence is continued in the present Great Britain which "retains all of the international rights and obligations that were not specifically related to the territories of the Dominions."

Ibid., May, 1927. *In Re Alienation of Sovereignty*, by E. Douglass Hamilton (pp. 521–542), while dealing with the constitutional problem whether

Congress or some other organ of the Federal Government has the right to alienate the sovereignty of the United States in the Philippines, raises incidentally questions bearing upon the transfer of sovereignty under international law.

CAMBRIDGE LAW JOURNAL, Vol. III, No. 1, 1927

The Imperial Conference and the Constitution, by Edward Jenks (pp. 13–23), surveys briefly the development of responsible government in the Dominions which finds its climax in the resolutions of the conference in 1926. These resolutions "are not to be taken as having heralded any new Constitution for the British Empire, but merely to have traced the development of the preceding ages, and to have recorded the destination at which it has arrived." There still remain, to bind the Empire together now that legal bonds have gone, the ties of sympathy, of mutual interest, and of possible scientific inventions which may make it possible to hold an imperial conference of prime ministers while each remains present in his own dominion capital. *The Right of Angary*, by W. I. Jennings (pp. 49–58), examines a number of recent British cases dealing with the requisition of neutral goods found within the country in time of war and compares their findings with the right of angary at international law. This right, the writer holds, forms part of the law of England, and is a prerogative of the Crown. "But no such right exists where the property of neutral subjects is brought into this country against their wishes, and not in pursuance of a legal right." Hence the decision of the court in *Commercial and Estates Co. of Egypt v. Board of Trade* was based upon a misconception of international law and was erroneous.

LAW QUARTERLY REVIEW, April, 1927

The Growth and Scope of Extra-Territoriality in China, II, by G. W. Keeton (pp. 238–261), gives some illuminating details of the procedure, including punishments inflicted for crime, followed by the consular courts, and in particular by the Mixed Court of Shanghai, in the years preceding the revolution. After a passing reference to recent changes the writer observes that "the task of reorganizing a whole legal system to meet the requirements of nearly one-quarter of the world's total population is a long one, and China will need a great deal of foreign assistance before the process is complete."

JOURNAL OF THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, July, 1927

The Imperial Conference, by Sir Robert Borden (pp. 197–207), recounts the consecutive steps by which the Dominions have "advanced to nationhood" within the British Commonwealth and have "gained a distinctive status within the family of nations." The conference of 1926 merely made certain readjustments and corrected certain anomalies which did not, however,

denote any "advance in status." Concern is expressed by the speaker by reason of commitments, such as the Locarno Treaty, which purport to involve Great Britain alone but which are directly concerned with the ultimate issue of war and thus involve the Commonwealth. *Problems of Equatorial Africa*, by Sir Frederic Lugard (pp. 214–225), emphasizes the need for research into the economic resources of the country and into the social effects of the new labor conditions. In addition there is the problem of education in substituting new standards of conduct for the old tribal discipline, and lastly the problem of effecting in the best way the transition from the Africa of the last century to the demands of the new era. *Italian Colonies and Colonial Policy*, by Count Aldobrandino Malvezzi (pp. 233–245), points out the present tendency of Italian colonial policy and the efforts being made by Italy to maintain high standards of colonial administration. Faith is expressed in the mandatory system of the League of Nations, and the opinion is ventured that the mandatory system "is bound to bring about, at least to a certain extent, some sort of international uniformity in colonial law."